ZONING 101: ZONING LAW AND TRIAL OF A ZONING CASE

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I. INTRODUCTION

Like most areas of the law, zoning law has its share of procedural rules 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, to the appeal in the Supreme Court or Court of Appeals. This paper attempts to provide a basic roadmap that highlights the common issues that arise as the case progresses from the local government to the appellate courts. **Fair warning:** there have been a number of significant rulings from the Georgia Supreme Court in recent years that question or reverse what had previously been accepted as settled law, so view this paper as a place to start research, not finish it.

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. The following are issues that should be covered at this initial stage.

A. Exhaust Administrative Remedies.

Filing a rezoning application is generally a necessary prerequisite to filing a zoning suit if the challenge is to the ordinance as applied to the land owner's property. See Elbert County v Sweet City, 297 Ga. 429 (2015); Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 178, 281 S.E.2d 522 (1981). The traditional zoning suit is where a property owner requests a zoning classification, his request is denied, and suit is

brought. The rationale for this requirement that relief first be sought from the local government is the exhaustion of administrative remedies. Under general legal principles, courts will not intervene if an administrative remedy is available. 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 dismissed.

There is an exception to this rule known as the futility doctrine, which applies when it appears that the filing of a rezoning application would be a futile act. Powell v. City of Snellville, 266 Ga. 315, 467 S.E.2d 540 (1996). However, to prove futility, an applicant must show that the local governing body has previously made a decision regarding the zoning application, and that filing the application would be a review of the same issue by the same body. See City of Suwanee v. Settles Bridge Farm, LLC., 292 Ga. 434, 738 S.E.2d 597 (2013).

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 application of a particular zoning classification 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. See Elbert County v. Sweet City Landfill, Inc., 297 Ga. 429 at 434 (2015). 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 burden of proof on the plaintiff bringing a facial challenge is heavy.

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). Facial challenges are suited to claims that the very text of the ordinance violates a fundamental right, such as those arising under the First Amendment. Even in these situations, however, it is often the best practice to attempt to get the property rezoned before bringing the challenge, because the property owner may get the desired result without the expense of litigation, and, if not, then both facial and as applied claims would be ripe for suit.

B. Raise Constitutional Objections.

A lawyer anticipating a legal challenge to a rezoning decision should raise a constitutional objection before the local government renders its decision. 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 should present his constitutional objections to the local governing body. 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 may result in the property owner being barred from challenging the zoning classification. 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.

Courts have held that 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 – the applicant there was not required to state the explicit provision of the constitution that was allegedly violated. There, a simple assertion that the denial of the rezoning would violate the applicant's constitutional rights to equal protection and due process was sufficient. However, failure to satisfy this requirement may bar the suit.

While the appellate courts often say that the obligation is to put the local government on notice of constitutional objections, the courts have on occasion applied this rule to bar claims that do not present issues of constitutional law. For example, in Trend Development Corp. v. Douglas County, 259 Ga. 425, 383 S.E.2d 123 (1989), the Supreme Court held that pleas in bar must also be raised before the local government. In that case, the plea was res judicata based on a prior zoning decision. Because *the County* did not raise the res judicata claim while the matter was pending before its

governing body, the Supreme Court held that it was waived. Similarly, in RCG Properties, LLC v. City of Atlanta Bd. of Zoning Adjustment, 260 Ga.App. 355, 579 S.E.2d 782 (2003), in the context of an appeal to the issuance of a permit, the Court of Appeals held that the local government's challenge to the standing of the challenger could not be raised for the first time in court and was waived because standing was not raised when the case was before the local government. Under these holdings, the local government, too, has a burden of raising some issues prior to the rezoning decision being made.

Telling a local government that it is violating the applicant's constitutional rights while at the same time asking the same body to grant a rezoning request takes tact. The constitutional objection should be raised in a manner that will be clearly reflected in the record (in case the local government denies that the objection was raised), but without putting the local government off with threats. The better practice is to file a written letter of constitutional objections with the local government that conveys the objection concisely but avoids threatening language. Then, at the local government hearing, the lawyer or property owner can focus on the merits of the application.

C. File the Appeal Promptly.

Another trap for the unwary is the speed at which a rezoning challenge must be brought. Challenges to zoning decisions generally must be brought within 30 days. Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981). 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.

The 30-day rule has been held to flow from the 30-day appeal time for appeals to the superior court. Under that case law, the 30 days run from the decision being reduced to writing. In some jurisdictions, that may only happen when the minutes of the meeting are adopted, which, under the Open Meetings Act, may be weeks later at the next regular council meeting. See Chadwick v. Gwinnett County, 257 Ga. 59, 354 S.E.2d 420 (1987).

Like other rules, there are exceptions to this rule as well. The 30-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 30-day requirement, nor the rezoning application requirement, would exist. See 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 30 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. See Golden v. White, 253 Ga. 111, 316 S.E.2d 460 (1984). This of course can be very frustrating to a developer who is relying on actions taken years before without challenge. In the Golden case, it did not matter that the persons bringing 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. The court found that rezoning runs with the land and not the person, and if the notice was defective, the rezoning is defective.

When the question is not whether the decision was valid, but what is the effect of the decision, then the courts have also not applied the 30-day rule on the grounds that this calls for a declaratory judgment, rather than an appeal. In Head v. DeKalb Co., 246 Ga.App. 756, 542 S.E.2d 176 (2000), 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 30-day limitation.

D. As to ZPL Requirements, Cross T's & Dot I's.

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 courts have repeatedly held that they are mandatory. Prior to the hearing, the important issue is whether the proper public advertisement has 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.

The Supreme Court has required strict 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 ensure all requirements are met.

E. Follow the Open Meetings Act.

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 may also be a violation 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 under threat of lawsuit. The attorney-client exception to the Open Meetings Act should only be used to discuss potential litigation, not to vote on the merits of the rezoning decision. The applicant should ensure that the vote taken is proper, as in the event of a challenge to the grant of the application, or it may be struck down.

F. Comply with the Local Charter or Enabling Act.

Another 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 indexed in volume 42 of the Official Code of Georgia. Likewise, county boards of commissioners are created by enabling acts. These documents will often contain the procedures governing the adoption of resolutions and ordinances, and may be applicable to the rezoning change. See the aforementioned Head v. DeKalb Co., 246 Ga.App. 756, 542 S.E.2d 176 (2000) case.

A caveat to this rule arises 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 prior sections presented a list of issues to watch out for at the local government level. If the lawyer has been involved since filing the application, those issues have presumably been dealt with, and if the local government did not render the desired rezoning decision, the suit is ready to be prepared and filed.

A. File in the Local Superior Court, and Get the Parties Right.

Traditionally, zoning suits were considered 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 cannot be tried in state court. The challenge is generally to the constitutionality of the existing zoning, not whether the proposed zoning is constitutional or provides a higher and better use. If there is a substantial gap between the existing zoning and the proposed zoning, the aggrieved property owner may wish to allege that the intervening zoning classifications are also not constitutional in order to avoid the Pyrrhic victory of having the existing zoning struck down, only to have the local government rezone the property to an intervening classification that still does not allow the desired 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.; see also 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). But see Lathrop v. Deal, 301 Ga. 408 (2017)(*discussing* the defense of sovereign immunity in regards to declaratory judgment and injunction cases).

If the challenge is to a successful rezoning of another 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. 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 may be superfluous in a challenge to a rezoning denial. When mandamus is sought, however, a public officer must be named, and the local government itself is not a proper party. See City of Homerville v. Touchton, 282 Ga. 237, 647 S.E.2d 50 (2007)(here, failing to name a public official resulted in the dismissal of the suit). A claim of personal wrongdoing can be brought against individual government officials; otherwise, 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). But see Lathrop v. Deal, 301 Ga. 408 (2017)(*discussing* the defense of sovereign immunity in regards to declaratory judgment and injunction cases and the availability of remedies against officers acting in their individual capacities).

The proper jurisdiction is of course the county where the local government sits, which of course is also where the land lies.

B. Prepare to Prove Standing.

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 issue is not as clear cut with neighboring property owners, who the courts have held must show a special interest different from the area in general that has been specifically damaged. This can be difficult to show and may require appraisers or other expert testimony showing how the neighbor's special interest has been damaged.

C. Choose the Form of the Action.

This is an area where recent case law must be considered before filing suit. Zoning appeals traditionally were either brought as declaratory judgment actions or mandamus cases. Sometimes they were simply styled appeals. The courts traditionally held that local governments had discretion to determine appeal procedures, 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). That rule has been reversed by City of Cumming v. Flowers, 300 Ga. 820 (2017), which held that the appeal remedy for an administrative decision was provided by statute, and the local government has no discretion to alter that. An administrative appeal would be to a

permit or variance denial, and Diversified Holdings, LLP v City of Suwanee, 302 Ga. 597 (2017) further indicates that would include a zoning decision that was specific to a particular property – i.e. a rezoning or special use permit decision. This indicates that certiorari, under O.C.G.A. § 5-4-1 *et seq*., would be the required appeal procedure. Practitioners are cautioned that the certiorari procedure is very complicated and fraught with pitfalls that may result in the dismissal of the appeal if not performed carefully.

The zoning appeal will generally 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).

This last point is one the local government attorney should keep in mind when defending the case, because, in the event that the local government loses, the judge may order the property rezoned in a specific manner, particularly if the parties submit proposed orders. That would be error, but appeals are discretionary and often not granted. So it is generally good practice to advise the court that, should the existing zoning classification be found to be unlawful, the proper remedy would be to direct that the property be rezoned.

D. Making the Right Claims.

There are a number of different claims for the practitioner to consider in the zoning appeal pleading.

1. TAKINGS

In a zoning case, the most common challenge is to the constitutionality of the existing zoning classification under a takings analysis. DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997). This is not an easy challenge, because the zoning ordinance is presumptively valid. Id., 267 Ga. at 626; Gradous v. Bd. of Commr's of Richmond County, 256 Ga. 469, 471, 349 S.E.2d 707 (1986). "The presumption that a governmental zoning decision is valid can be overcome only by a plaintiff landowner's showing by clear and convincing evidence that the zoning classification is a significant detriment to him, and is insubstantially related to the public health, safety, morality and welfare. Only after both of these showings are made is a governing authority required to come forward with evidence to justify a zoning ordinance as reasonably related to the public interest. If a plaintiff landowner fails to make a showing by clear and convincing evidence of a significant detriment and an insubstantial relationship to the public welfare, the landowner's challenge to the zoning ordinance fails." Id. See also Diversified Holdings, LLP v City of Suwanee, 302 GA 597 (2017).

The significant detriment can be difficult to show. See Gwinnett Co. v. Davis, 271 Ga. 158, 517 S.E.2d 324 (1999)(evidence that landowner would suffer economic loss without rezoning was insufficient to show substantial detriment). There are a number

of cases which defense attorneys can rely upon to show that a property has not suffered a significant detriment. "[A] significant detriment to the landowner is not shown by the fact that the property would be more valuable if rezoned, or by the fact that it would be more difficult to develop the property as zoned than if rezoned." DeKalb v. Dobson, 267 Ga. at 626. Delta Cascade Partners, II v. Fulton Co., 260 Ga. 99, 100, 390 S.E.2d 45 (1990). "[E]vidence only that it would be difficult to develop the property under its existing zoning or that the owner will suffer an economic loss unless the property is rezoned is not sufficient to support the legal conclusion that the owner suffers a significant detriment." Gwinnett Co. v. Davis, 268 Ga. 653, 654, 492 S.E.2d 523 (1997); see, Holy Cross Lutheran Church, Inc. v. Clayton Co., 257 Ga. 21, 23, 354 S.E.2d 151 (1987).

The courts recognize that increasing density or intensity almost always increases value, but that does not prove that the current zoning is unconstitutional. "[I]n zoning challenges, the pertinent question is not whether rezoning would increase the value of property, but rather whether the existing zoning classification serves to deprive a landowner of property rights without due process of law. Hence, the evidence that the subject property would be more valuable if rezoned border on being irrelevant." DeKalb Co. v. Dobson, 267 Ga. at 626; see, DeKalb Co. v. Chamblee Dunwoody Hotel Partnership, 248 Ga. 186, 190, 281 S.E.2d 525 (1981). The notion that a property is not zoned for its "highest and best use," a concept appraisers like to use, does not show that the existing zoning imposes a significant detriment. Gwinnett Co. v. Davis, 268 Ga. at

654. Furthermore, "the fact that the property currently has no economic return to the owners is immaterial; by definition, undeveloped property never offers owners any economic return." DeKalb Co. v. Chamblee Dunwoody Hotel Partnership, 248 Ga. at 190. All this is not to say that the significant detriment requirement is an insurmountable burden; courts can and have found a significant detriment on numerous occasions, but the property owner will need to be prepared to put forth a detailed and compelling case on this point.

A useful case discussing significant detriment is Legacy Inv. Group, LLC v. Kenn, 279 Ga. 778, 621 S.E.2d 453 (2005), which was on appeal from the grant of the local government's motion for summary judgment. There, the property owner had paid about $12,000 per acre for land zoned for agricultural land with the presumption that it would be rezoned for residential uses. When the rezoning was denied, the property owner appealed, arguing that it could not be developed in an economically feasible fashion based upon the purchase price. The superior court found that the fact that the property owner overpaid for the property did not mean that the zoning ordinance was a significant detriment to the property. On appeal, the Supreme Court reversed because the evidence was that the property would have to be purchased for no more than just over $5,000 per acre in order to be developed in an economically viable manner, and the county's appraiser said the property was worth between $5,000 and $9,000 per acre. Thus, giving the non-movant the benefit of all the inferences from the evidence, the property would have to be purchased for several thousand dollars less per acre than

it was worth in order to be developed in an economically feasible manner. The court also mentioned that the property was not suited for agricultural uses; while not discussed much by the court, this would seem to be an important piece of evidence.

In City of Tyrone v. Tyrone, LLC, 275 Ga. 383, 565 S.E.2d 806 (2002), the Supreme Court found that part of a property subject to the appeal of a rezoning denial suffered a significant detriment, but part did not. The property in question was partially zoned for agricultural-residential uses, and partly zoned for office-institutional uses. The property owner wanted it all zoned for commercial uses. The court held that there was evidence that the portion zoned for agricultural-residential could not be developed as zoned, but there was no such evidence as to the office-institutional portion, and so the trial court erred in finding a significant detriment to that portion of that property. In reaching this conclusion, the Supreme Court discussed the fact that the owner had not tried to develop the property for office-institutional uses and the fact that there was evidence of a need for such property in the community and region. From these cases, we can see that the evidence needed is not that the property can make more money with the rezoning, but that the property is not suited for development under the existing zoning classification, such that it cannot be used in an economically feasible manner under the existing zoning classification.

After a plaintiff shows significant detriment, he still needs to prove that the current zoning is insubstantially related to the public health, safety, morality and welfare. DeKalb Co. v Dobson, 267 Ga. at 626; Browning v. Cobb County, 259 Ga. 430,

383 S.E.2d 126 (1989)(showing of detriment outweighed by public benefit of present zoning classification). This requires proof that there is no logic to the existing zoning classification. It can be shown by pointing to the incompatibility of the subject zoning with the neighborhood or the changing character of the neighborhood. However, it can be difficult to prove if the property is simply on the boundary of the zoning district, which is commonly referred to as a "fringe area." See Holy Cross Lutheran Church v. Clayton County, 257 Ga. 21, 354 S.E.2d 151 (1987).

The degree of consistency between the existing and proposed zoning and the comprehensive or future land plan is a common element in this analysis. In City of Atlanta v. TAP Associates, 273 Ga. 681, 683, 544 S.E.2d 433 (2001), the court placed great emphasis on the fact that the existing zoning was consistent with the land use plan of Atlanta: "[T]he city's zoning decision is consistent with the policies and long-range planning goals for the area as adopted in the comprehensive development plans and the Buckhead transit station report....The fact that TAP presented evidence that its proposed mixed-use development would also protect the single-family neighborhood is irrelevant. The issue is not whether the city could have made a different decision or better designation in zoning TAP's property, but whether the choice that it did make benefits the public in a substantial way." 273 Ga. at 685. Thus, if an existing zoning classification is consistent with the comprehensive plan, it is more likely to be upheld.

Takings claims are challenging to prove under Georgia law, but under federal law they are even more so. Federal courts have held that the property owner must show that

the property has been deprived of all economically viable use. Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996). Cobb County v. McColister, 261 Ga. 876, 413 S.E.2d 441 (1992). Federal takings claims are generally not ripe unless the state has failed to provide a remedy. A federal claim cannot ripen if the state provides method of redress for a taking without just compensation, and the federal courts have held that Georgia provides such a remedy. See Bickerstaff Clay Products Co., Inc. v. Harris County, Ga., 89 F.3d 1481, 1491 (11th Cir. 1996). Because of these holdings, the aggrieved property owner will normally want to bring the takings claim in state court.

2. DUE PROCESS

Due process encompasses a more limited challenge, mainly in the context of procedural due process. Substantive due process has been held to be subsumed into takings, and so does not typically constitute a separate challenge to a rezoning decision, but procedural due process may be a fertile avenue to challenge a rezoning decision. The unsuccessful applicant can claim that there was some defect in the zoning procedure and perhaps obtain another rezoning hearing. The applicant may also be able to challenge the adoption of the underlying zoning ordinance. The practitioner should consider what benefit the client will achieve from such a challenge, as the local government can normally go back and do the same thing in a procedurally correct manner.

Basic procedural due process requires notice and a hearing. The procedures required in conducting a rezoning hearing have been codified in the Zoning Procedures

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

Tilley Properties involved the notice and hearing requirements of O.C.G.A. § 36-66-5(c). O.C.G.A. § 36-66-5(c) requires notice and a hearing both for the adoption of standards and for the adoption of policies and procedures governing the conduct of zoning hearings – the two are handled identically by the ZPL. Tilley Properties dealt with Bartow County's failure to provide notice or a separate hearing when it adopted its policies and procedures. This failure invalidated the entire zoning ordinance of the county. The court held, "Prior to the adoption of the policies and procedures, O.C.G.A. § 36-66-5(c), a local government must publish within a newspaper of general circulation a notice of the public hearing, O.C.G.A. § 36-66-4, and a public hearing must be held on

the proposed action.... The trial court erred in failing to hold that the County did not comply with the statute and that the ordinance is void." 261 Ga. at 154.

Thus, 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 restriction on the property at all. The official zoning map should either be spread upon the minutes or referred to by reference in a readily identifiable manner. Discovering a defect from years before can be sufficient to invalidate the entire ordinance and relieve the applicant, and potentially the entire jurisdiction, of zoning restrictions. See Tilley Properties, Inc. v. Bartow County, 261 Ga. 153, 401 S.E.2d 527 (1991).

E. Getting Damages and Fees.

There has been little success on the part of plaintiffs in seeking damages for unconstitutional rezonings. Generally, the remedy for an unconstitutional zoning is getting the property rezoned in a constitutional manner. One avenue that has been tried is to assert a temporary taking. That is, for the period that a property was subjected to an unconstitutional zoning, 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. See 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 30 days'

notice before filing suit, but that of course impacts the 30-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.

42 U.S.C. § 1983 claims have not been very successful in state court either, in that the state courts 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 of all economic use of the property. See Dover v. City of Jackson, 246 Ga.App. 524, 541 S.E.2d 92 (2000). Moreover, raising federal claims under § 1983 may result in the case being removed to federal court.

On occasion an award has been made for attorney fees in zoning suits under O.C.G.A. § 9-15-14 and under the Anti-SLAPP statute. See Rabun County v. Mountain Creek Estates, LLC, 280 Ga. 855, 632 S.E.2d 140 (2006); EarthResources, LLC v. Morgan County, 281 Ga. 396, 638 S.E.2d 325 (2006); Hagemann v. City of Marietta, 287 Ga.App. 1, 650 S.E.2d 363 (2007).

IV. PROCEEDINGS IN APPELLATE COURT

A. When in Doubt, File a Discretionary Appeal Application.

Once a judgment has been obtained in superior court, the traditional 30-day appeal clock applies, and the first question is whether the appeal should be by application or direct. 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. This is another case where recent cases have reversed prior decisions. In Trend Development Corporation v. Douglas County, 259 Ga. 425, 383 S.E.2d 123 (1989), the Supreme Court 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. This was based on the reasoning that 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)." The decision was reversed by Schumacher v City of Roswell, 301 Ga 635 (2017), which held that the determination of whether a discretionary application was required depended on whether the trial court was sitting as an appellate court reviewing an administrative decision of the local government. In Schumacher, the court was considering a new zoning ordinance and new official zoning map of the City of Roswell, rather than a simple rezoning of a single property. In this context, the court held that the local government acted in a legislative, rather than quasi-judicial capacity, and no discretionary application was required. The take-home message is that a precise

identification of the decision being challenged is required before you can determine what type of appeal to file. There are a number of older decisions that may inform that analysis.

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. 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 for 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. In the case of Sprayberry v. Dougherty County, 273 Ga. 503, 543 S.E.2d 29 (2001), 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.

However, 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 application for appeal. Ferguson v. Composite State Bd. of Medical Examiners, 275 Ga. 255, 564 S.E.2d 715 (2002), was not a zoning case; it involved a doctor's 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.

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 has been to file both a direct appeal and a discretionary application. However, O.C.G.A. § 5-6-35(j) has been revised to state that an application will count as a notice of appeal if a direct appeal is authorized. In most any case related to zoning, 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.

B. Determine the Proper Appellate Court.

A less critical issue would be the proper court for an appeal. The Supreme Court and Court of Appeal's respective jurisdiction is 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.

Either court will transfer to the proper court, so there is no penalty for getting things wrong, other than delay. 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. Some say that, when in doubt, file in the Supreme Court, so that if you get transferred, at least it will only happen once. However, due to internal court rules about how applications for discretionary review are granted, the odds of getting a discretionary appeal granted may be better in the Court of Appeals.

C. When Filing an Application, Be Persuasive and Follow the Court's Rules.

When an application is required, the application itself will be the most important brief filed in the appeal. Practically speaking, it must convince the reader that there is error, and it is a significant enough case to justify review. Neither appellate court takes many zoning appeals, so the task of the practitioner is to show that this case is one of those that deserves appellate review. In no way should the application be considered a

form or formality; it must be a compelling and detailed explanation of the merits and importance of the case. Both appellate courts have particular rules for the procedure and standard for granting a discretionary appeal, and those rules should be followed strictly. (Rules 33 & 34 for the Supreme Court; Rule 31 for the Court of Appeals)