**Constitutional Limitations on Zoning Actions**

Simon H. Bloom

Since the passage of the Home Rule Amendment to the Georgia Constitution in 1983, the ultimate authority over zoning and planning has rested squarely with local governments. Under the Home Rule, counties and municipalities have the express authority to enact zoning regulations: “[t]he governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning.” GA. CONST. Art. IX, § 2, ¶ 4. In most Georgia jurisdictions, the city council or county commission bears the responsibility for regulating the use of property in its jurisdiction. Local government power over land use, however, is not without limitations. Zoning actions are often challenged by property owners claiming violations of their constitutional rights, and such claims act as an important check on the zoning power of local governments.

1. **Notice of Constitutional Claims**

Before a constitutional challenge to a zoning decision can be raised in Superior Court, sufficient notice must be given to the local government that the constitutional claim is being raised. See Ashkouti v. City of Suwanee, 271 Ga. 154, 155 (1999) (“[A] constitutional attack upon a zoning classification has to be raised before the board of county commissioners (zoning authority)”). A litigant may not raise a constitutional claim for the first time in Superior Court, and a claim is subject to dismissal on that basis. DeKalb County v. Post Properties, 245 Ga. 214, 217 (1980). The notice to a zoning authority does not have to meet a high standard of particularity, as long as it amounts to “fair notice that a constitutional challenge is being raised.” Ashkouti, 271 Ga. at 155. To preserve potential claims, written notice setting out any conceivable claim should be provided to the local government prior to the public hearing.

1. **Due Process Challenges to Zoning**

Under Georgia law, a zoning ordinance is presumptively valid. Guhl v. Holcomb Bridge Road Corp., 238 Ga. 232, 324 (1986). To overcome this presumption, the party challenging a zoning ordinance must show, by clear and convincing evidence, that the zoning at issue presents a significant detriment to the landowner and does not substantially advance the public health, safety, morality, and welfare. Diversified Holdings, LLP, 302 Ga. 597, 612 (2017). If this initial burden is met, the governing authority then comes forward with justification for the zoning as reasonably related to the public interest. Candler & Associates, Inc. v. City of Roswell, 258 Ga. 621, 622 (1988) (internal quotation marks omitted).

For years, Georgia courts applied this balancing test under the theory that the zoning regulation potentially constituted a “taking” under the Fifth Amendment of the United States Constitution and an inverse condemnation under Article I, Section III, Paragraph I of the Georgia Constitution. The Georgia Supreme Court recently clarified in Diversified Holdings, LLP, 302 Ga. 597, 612 (2017), however, that this test is an inquiry into whether a property owner’s due process rights have been violated and not whether an inverse condemnation has occurred. See id. at 610 (“It only means that this type of claim 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. ‘There is no question that the ‘substantially advances' formula was derived from due process, not takings, precedents.’”) (quoting Lingle v. Chevron USA, Inc., 544 U.S. 528, 540-41 (2005)). The Georgia Supreme Court explained that “zoning is unlikely to be a fertile ground for inverse condemnation claims.” Id. The Court made clear that litigants still have potentially valid claims under the “substantially advances” test, but “this type of claim 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.” Id.

1. Proving Significant Detriment to the Property Owner

On a challenge to a denial of a rezoning application, the question of whether the zoning presents a significant detriment to the landowner focuses on whether the property owner will suffer significant loss from the present zoning classification, not whether detriment will result from a denial of a rezoning. See Gwinnett Cnty. v. Davis, 271 Ga. 158 (1999). Accordingly, Georgia courts have consistently rejected the position that an increase in valuation from a change in zoning is a basis for finding significant detriment. Town of Tyrone v. Tyrone, LLC, 275 Ga. 383, 386 (2002).

Although it is difficult to prove significant economic detriment, Georgia courts have accepted several types of proof to make the showing. For example, development costs and market-feasibility analysis can be used to show significant detriment. Candler & Associates, Inc. v. City of Roswell, 258 Ga. 621, 622 (1988). A property owner can show facts of significant detriment where the property owner would have to purchase the property at a cost lower than fair market value to feasibly develop the property under the current zoning. See Legacy Investments Group, LLC v. Kenn, 279 Ga. 778, 781 (2005). Evidence that property is worth less than other property similarly zoned is also informative. Candler, 258 Ga. at 622. An actual decrease in value since the purchase of the property as a result of current zoning demonstrates significant detriment. Davis, 268 Ga. at 654-55 (1997) (noting “the trial court would be authorized to conclude that the Davises had suffered a significant detriment from the present R–100 classification if it finds clear and convincing evidence of a substantial decrease in the value of the Davises' property for its R–100 use.”). The highest and best use of property is not sufficient to prove detriment, but is still a helpful factor for the analysis. Waffle House v. DeKalb Cnty., 251 Ga. 55, 56 (1983).

1. Proving Insubstantial Relationship to Public Health, Safety, Morality, and Welfare

This determination of the relationship to the public health, safety, morality, and welfare is made on a case-by-case basis, and the following well-established factors are considered:

(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 property values of the plaintiffs promotes the 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.

Guhl, 238 Ga. at 324.

A number of interests will support a restriction on land use, including aesthetics, environmental impact, injury to neighboring property, traffic impacts and potential hazards to pedestrians, and the long-range planning goals for the area. Diversified Holdings, LLP, 302 Ga. at 612. Whether current zoning is consistent with the policies and long-range planning goals for the area is a particularly relevant factor where the zoning ordinance at issue was adopted after extensive study and public debate. Id. at 613.

A plaintiff should aim to demonstrate that the proposed development will not adversely impact property values in the area and will not substantially increase burdens on infrastructure like water, sewer, emergency services, local schools, or traffic. A litigant may also want to establish evidence of benefits of the proposed development, such as increased property values, increased tax revenues, or additional commerce generated by the development.

Expert testimony is an essential component of making out a successful due process challenge to a zoning decision. Appraisers are often used to demonstrate a decrease in the property’s value due to the current zoning classification, lack of demand or economic use of the property at its current zoning, in contrast to a great demand for the property under the rezoned classification. The expert may also be utilized to prove the highest and best use of the property and how the current zoning prevents the property from realizing that use. Land planning experts may be used to show that the property cannot be feasibly developed at its current zoning, using evidence that costs of development would be so high that the owner has no practical or profitable use of the property.

1. **Equal Protection Claims**

A plaintiff may also attempt to claim a zoning decision violates the Equal Protection Clause of the United States and Georgia Constitutions. A plaintiff looking to establish an equal protection claim as a “class of one” must allege that: (1) she has been intentionally treated differently from others similarly situated, and (2) that there is no rational basis for the difference in treatment. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). To be similarly situated, the comparators must be prima facie identical in all relevant respects. Foley v. Orange County, 638 F. App’x 941, 945 (2016). Given the difficulty of making a showing of similarly situated comparators, as well as the low standard of a rational basis for the difference in treatment, equal protection challenges to zoning decisions are relativity unsuccessful in Georgia.

Nevertheless, if a litigant believes it is being treated differently than other applicants, it is necessary to obtain as much information as possible about potential comparators. The sooner this information is obtained the better, both for development of the record in support of the claim and for the litigant’s own analysis of the claim’s viability. Making an Open Records Request under O.C.G.A. § 50-18-70, *et seq.* to the zoning authority regarding recently granted rezoning applications is a helpful tool to obtain this information.

1. **Inverse Condemnation and Takings Claims**

While the Georgia Supreme Court stated in Diversified Holdings that “zoning is unlikely to be fertile grounds for inverse condemnation claims,” the Georgia Supreme Court also recognized three scenarios where Georgia courts have recognized takings and inverse condemnation claims, including: (1) actual physical invasion of property like takings for the “paving of a turn lane, increased noise and odor from a county’s sewage plant, and flooding, siltation, and pollution from surface water diverted by roadway maintenance[;]” (2) an alleged regulatory taken when an owner is completely deprived of use of the property; and (3) takings under the test set forth in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). Diversified, 302 Ga. at 607-08. With respect to the third category, which are “notoriously hard to adjudicate,” the Georgia Supreme Court has stated that “[r]egulations that fall short of eliminating property’s beneficial economic use may still effect a taking, depending upon the regulation’s economic impact on the landowner, the extent to which it interferes with reasonable investment-backed expectations and the interests promoted by the government action.” Mann v. Georgia Dep't of Corr., 282 Ga. 754, 757 (2007). While Diversified Holdings has cast doubt some doubt on the viability of takings/inverse condemnation claims in the zoning context, the Georgia Supreme Court did not overrule any of the decisions cited in its opinion to support these theories of liability.

1. **Retroactive Depravation of Vested Rights**

Recent Georgia Supreme Court authority provides an avenue to challenge laws that attempt to retroactively deprive landowners of vested rights. The Georgia Constitution provides that “[n]o bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.” Georgia Const. Art. I, Sec. 1, Para. X. In Southern States-Bartow Cnty., Inc. v. Riverwood Farm Homeowners Association, 300 Ga. 609 (2017), the Georgia Supreme Court explained that “[l]aws prescribe ... for the future; they cannot ... ordinarily, have a retrospective operation....” and “[o]ur Constitution prohibits a legislative exercise of the police power that results in the passage of retrospective laws which injuriously affect the ‘vested rights’ of citizens.” Id. at 611 (internal quotation marks omitted). Moreover, “[t]his prohibition against retroactive impairment of vested rights extends to the enactment of zoning regulations, which is an exercise of police powers.” Id. at 612. In Southern States, the Georgia Supreme Court found an ordinance providing that “[a]ny intended non-conforming use for which a vested right was acquired prior to the adoption of this ordinance or the adoption of an amendment thereto shall be prohibited unless such is actually commenced within one year of the adoption of this ordinance or the adoption of an amendment thereto regardless of the intent or expectation to commence or abandon such non-conforming use” unconstitutional as applied to the landowner. The Georgia Supreme Court reasoned that the ordinance acted “to eliminate a previously acquired vested right if the non-conforming use is not commenced within one year—i.e., if the land is not actually used for the non-conforming purpose within that time frame.” Id. at 613. As a result of the Southern States decision, landowners with vested rights claims should remember to include Georgia Const. Art. I, Sec. 1, Para. X in their constitutional notice letters and complaints challenging regulations that impact or impair the landowner’s already acquired vested rights.

**Challenging or Appealing and Administrative Zoning Decision**

1. **Certiorari to Superior Court**
2. *Applicability of the Statute*

Certiorari is one of the most common ways to appeal to superior court an unfavorable decision by a local government. Certiorari is the mechanism to appeal “quasi-judicial” decisions, so a litigant must determine if the challenged action of the local government qualifies as a quasi-judicial act. The Georgia Supreme Court’s decision in Diversified Holdings includes language that likely renders more categories of local government decisions as “quasi-judicial,” and thus, reviewable through certiorari. Specifically, in Diversified Holdings, the Georgia Supreme Court evaluated whether a decision to deny a rezoning application constituted an adjudicative decision of a local administrative agency. In its analysis, the Court compared adjudicative decisions to legislative acts, explaining that:

[a]dministrative determinations of a legislative nature are prospective in application, general in application, and often marked by a general factual inquiry that is not specific to the unique character, activities or circumstances of any particular person, ... [d]eterminations of an adjudicative nature, on the other hand, are immediate in application, specific in application, and commonly involve an assessment of facts about the parties and their activities, businesses, and properties.

Id. at 601. The Court went to on to say that “[t]he enactment of a development or zoning code is, quintessentially, a legislative action that is prospective in application,” while “an application to rezone a particular parcel like the application involved here involves an individualized determination based on the character and circumstances of that particular parcel of land.” Id. at 603. As a result, the Court concluded that “[a] landowner’s challenge that seeks recognition that a zoning ordinance is unlawful with respect to a particular parcel of land thus is the type of individualized application of law to facts and circumstances that constitutes an adjudicative decision.” Id. While the Diversified Holdings’ discussion was in the context of whether a discretionary or direct appeal was proper, the language is likely broad enough to determine what types of local government action are subject to Georgia’s certiorari statute.

1. *Procedural Requirements*

The statutory scheme for writs of certiorari has been called out as an “archaic proceeding which is a mystery today.” Fisher v. City of Atlanta, 212 Ga. App. 635, 637 (1994). The requirements under O.C.G.A. § 5-4-1, et seq., involve a myriad of procedural hurdles, each presenting a potential trap for the unwary. Litigant must carefully follow steps for petitions for certiorari:

* **30 Days to File**: Appeals of zoning decisions must be filed in the appropriate superior court within thirty days of the challenged decision. O.C.G.A. § 5-4-6(a). This is a subject matter jurisdiction issue, and the court has no discretion to amend or grant a longer time period to file. A best practice is to assume the clock starts to tick from the date of the meeting when the decision is made (and not when the decision is set forth in writing).
* **Name Correct Parties**: The decision-making body is the “Respondent” to the certiorari petition (*i.e*., the Board of Zoning Appeals, Board of Commissioners), while the local government is the “Opposite Party”/”Defendant” (*i.e*., the city or county).
* **Obtain Certificate of Costs and Bond**: A certificate of payment of costs is a simple document signed by the officer or clerk whose decision is the subject matter of the petition stating all costs have been paid. A bond must also be given for amount equal to monetary damages claimed plus future costs. O.C.G.A. § 5-4-5. A litigant should start the process of obtaining signatures for the certificate of costs and bond from the local government early in the 30-day window to ensure enough time to get the required documents back in time to file them with the petition.
* **Obtain Sanction From Superior Court Judge**: The sanction is a document signed by the judge ordering the clerk to file the petition and issue the writ of certiorari directing the inferior judiciary to certify and send up the record. O.C.G.A. § 5-4-3. The sanction cannot be issued if petition is presented to Court more than 30 days after the decision. Again, it is a good idea to present the finalized petition, signed certificate of costs and bond, and prepared sanction for the superior court to sign a few days in advance of the 30-day deadline, because a superior court judge may not act as quickly as the litigant would like in signing the sanction. Communication with a judge’s staff attorney a few days in advance is also helpful to notify them of the filing and to get an idea of the court’s schedule.
* **File the Petition**: The petition should be like a complaint stating errors complained of and grounds for relief. The superior court cannot consider any ground for error which is not distinctly set forth in the petition. A litigant should include with the petition the certificate of payment of costs, bond, and sanction.
* **Obtain Writ of Certiorari from Clerk**: The litigant should present a prepared writ of certiorari, along with the filed petition and supporting documents, to the clerk on the same day as the litigant files the petition. It is a best practice is to ensure clerk files the writ within the 30-day time limit.
* **Service of Process**: Respondent must be served *within 5* days of filing the writ under O.C.G.A. § 5-4-6(b). A copy of the petition and writ shall also be served on the opposite party or his counsel or other legal representative, in person or by mail. Id.
* **Monitor Local Government’s Time to Answer:** The government has 30 days to answer. If government fails to send up record within 30 days, the best practice is to follow-up to ensure record is filed.
* **File exceptions or traverse to the answer**: The petitioner has 15 days to respond to answer by filing exceptions or traverse to answer. O.C.G.A. § 5-4-9. The traverse should set out any deficiencies in the record filed by the local government, including any omissions of record documents. In addition, if factual averments are made in the answer, the litigant should traverse those factual allegations or the superior court can rely on the facts in deciding the appeal.
* **Trial by Court or Jury**: Certiorari cases shall be heard by the court without a jury, in chambers or in open court, upon reasonable notice to the parties, at any time that the matters may be ready for hearing. Where a traverse to the answer has been filed and jury trial demanded, the matter may be tried at any time a jury is available therefor. O.C.G.A. § 5-4-11. Scope of review is limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence. O.C.G.A. § 5-4-12. Georgia courts have interpreted “substantial evidence” to mean “any evidence.” The trial is on the record below, so it is important to include in the record before the local government any documents or even affidavits that the litigant wants to rely on in the appeal to superior court.
1. **Declaratory Judgment**

In Georgia, “[a] declaratory judgment is an especially and particularly appropriate method of determining a controversy with respect to the constitutionality of an Act of the legislature.” Carson, Jr. v. Brown, A18A1951, 348 Ga. App 689 (2019). Accordingly, declaratory judgment claims are often used to challenge land use ordinances on constitutional grounds. Recent Georgia case law, however, makes clear that sovereign immunity bars declaratory judgment and injunctive relief claims against governmental entities and officials in their official capacities. See Lathrop v. Deal, 301 Ga. 408 (2017). Official immunity “does not bar suits for declaratory or injunctive relief brought against county officers in their individual capacities.” Love v. Fulton Cnty. Bd. of Tax Assessors, 348 Ga. App. 309, 321 (2018). Thus, it is important to name officials individually if a litigant seeks declaratory or injunctive relief in the complaint.

1. **Mandamus**

Mandamus relief is proper against a public official where the petitioner has a clear legal right to relief or demonstrates a gross abuse of discretion. City of Hoschton v. Horizon Cmtys., 287 Ga. 567, 569 (2010). To have a clear legal right to relief, the legal duty sought to be enforced must arise by law, either expressly or by necessary implication; and the law must require its performance. Id. Moreover, “[w]hen the law requires an official to exercise discretion, mandamus will lie to compel that discretion be exercised, [although it will not] dictate the result[.]” Quarters Decatur, LLC v. City of Decatur, 347 Ga. App. 723, 727, 820 S.E.2d 741 (2018) (internal quotation marks omitted) (alterations in original). “Mandamus is the proper remedy when a governmental board fails to conduct a hearing as required by law.” Quarters Decatur, LLC, 347 Ga. App. at 726–27. Thus, if a litigant can point to a legal requirement that a government official failed to follow, mandamus may lie to compel performance of that legal obligation on the part of the official.