ZONING AND PLANNING LAW IN GEORGIA

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Introduction

This paper is meant to provide readers with the basics of zoning and planning law in Georgia. Land use and zoning law in Georgia is primarily shaped by local policies since substantive planning and zoning powers have been specifically delegated to local governing authorities by the Georgia Constitution. As such, local officials have been given a tremendous amount of power and responsibility in making decisions that will shape our built and natural environments. These officials will be increasingly called upon to handle complex and politically-sensitive land use issues such as urbanization, demographic shifts in housing preferences, regional transit, climate change, and natural resource scarcity over the next several decades. We see the next fifty years as truly critical to the continued success of our local communities as they seek to balance the public health, safety, and welfare with the ever-evolving needs and demands of economic development and growth.

Zoning Law in Georgia

The Georgia Constitution delegates the legislative power to zone to local governments.[1] The zoning of property is an exercise of the police power which encompasses a wide range of classifications and procedures. As an exercise of the police power, zoning is subject to the constitutional requirements of equal protection, due process, and the prohibition against taking property without the payment of just compensation.[2] Any exercise of the police power necessarily restricts the actions of certain people and sometimes causes economic loss. This loss, however, must be justified by a benefit to the general public health, safety and welfare. As such, the Georgia Supreme Court has created a literal balancing test in zoning cases which weighs the

[1] Ga. Const. of 1983, Art. IX, § II, ¶ IV.
[2] *See Rockdale County v. Burdette*, 278 Ga. 755 (2004).

detriment to the property owner with the government's interest in protecting the public health, safety and welfare to determine the constitutionality of a zoning decision. Georgia's constitutional balancing test is described below in the seminal zoning case of *Guhl v. Holcomb Bridge Road*:

> "As the individual's right to the unfettered use of his property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable... As these critical interests are balanced, if the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void... Moreover, we specifically rule that for such unlawful confiscation to occur, requiring that the zoning be voided, it is not necessary that the property be totally useless for the purposes classified... It suffices to void it that the damage to the owner is significant and is not justified by the benefit to the public."[3]

The power to zone property includes the power to rezone property as well. The rezoning of property under a local ordinance is simply the passage of an ordinance or resolution amending the designation of a property on the local zoning map. Rezoning actions involve a change in the zoning classification of a property, generally from a less intensive use to a more intensive use, though recently we have seen the opposite occur as many applicants are seeking to "downzone" property from higher-intensity uses, such as commercial, to residential classifications in an effort to capitalize on the heightened demand for attached and multi-family dwellings. The rezoning process differs from the legislative process initially establishing zoning laws "in that it normally begins with the application of one or more property owners for relief against the alleged unconstitutional or injurious effects of the existing zoning requirements" on a particular property.[4] Since rezoning requests generally seek to change the zoning classification on one or a

[3] *Guhl v. Holcomb Bridge Rd.*, 238 Ga. 322 (1977).
[4] 1 George A. Pindar & Georgine S. Pindar, Real Estate Law & Procedures, § 3-4.1 (4th ed. 1993).

few parcels of property in a piecemeal fashion, issues of "spot zoning"[5] and incompatible land uses often arise.

In rezoning cases, it is important to understand the burden of proof on the applicant at the public hearing. The burden of proof at the local government level is likely similar to what it is in judicial proceedings, which is that the rezoning applicant must prove by clear and convincing evidence[6] that he or she will suffer a significant detriment under the existing zoning and that the existing zoning bears an insubstantial relationship to the public health, safety, morals and welfare.[7] If a zoning request is denied by the local government, a disappointed applicant may appeal the denial to the Superior Court with competent jurisdiction within 30 days of the denial in the manner set forth by the local zoning ordinance.[8] The local government's zoning decision is reviewed de novo by a court, which means the court is not bound to the record created by or evidence presented to the local legislative body.[9] Parties are able to submit new evidence, expert witnesses, and testimony to the court regardless of whether such information was introduced before the local governing body.[10]

It is important to note that constitutional challenges to a zoning ordinance or decision must be made at the local government level. Constitutional challenges cannot be made for the

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[5]Georgia courts have defined "spot zoning" as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners." *East Lands, Inc. v. Floyd County*, 244 Ga. 761, 764(3) *quoting Jones v. Zoning Bd. of Adjustment,* 32 N.J.Super. 397, 108 A.2d 498, 502 (1954).

[6] The "clear and convincing" burden was established in *Gradous v. Richmond Co. Bd. of Commr's,* 256 Ga. 469 (1986). The "clear and convincing" standard requires a plaintiff to carry a burden greater than the "preponderance of evidence" standard typically required in civil cases.

[7] *DeKalb County v. Albritton Properties*, 256 Ga. 103 (1986); *DeKalb County v. Chamblee Dunwoody Hotel Partnership*, 248 Ga. 186 (1981) (evidence that the property would be worth substantially more if rezoned is not sufficient to show significant detriment).

[8] *Village Centers Inc. v. DeKalb County*, 248 Ga. 177 (1981).

[9] *See Stendahl v. Cobb County*, 284 Ga. 525 (2008).

[10] *See Cobb County Bd. of Comm'rs v. Poss*, 257 Ga. 393 (1987).

first time in superior court.[11] Courts review the sufficiency of a constitutional challenge on a case by case basis to determine whether the record made before the local governing authority, or quasi-judicial body, was sufficient to put the authority or body on notice of a constitutional challenge.[12] According to the Georgia Supreme Court, constitutional challenges do not have to be made with great specificity. Fair notice that a constitutional challenge is being made is all that is required.[13]

The standard of review differs in cases involving variances or special exceptions, which are typically made by a zoning board (typically a Board of Zoning Appeals or Board of Zoning Adjustment) narrowly analyzing the facts and circumstances of a case under specific criteria. Decisions by a zoning board are considered "quasi-judicial" decisions and are reviewed under an "any evidence" standard of review *on the record.*[14] This means that on appeal, if there is any evidence in the public record to support the zoning board's decision, the decision will be upheld. Practically speaking, this is a difficult burden for a plaintiff to overcome.

The Interaction between Planning and Zoning

Though zoning and planning are closely related functions, they are separate powers of a local government. Both zoning and planning are exercised through a local government's police power, and all local governing authorities in the State are authorized to plan and zone property

[11] *Ashkouti v. City of Suwanee*, 271 Ga. 154 (1999).
[12] *See Outdoor Systems, Inc. v. Cobb County*, 274 Ga. 606 (2001).
[13] *See Ashkouti v. City of Suwanee*, 271 Ga. 154 (1999); *Outdoor Systems v. Cobb County*, 274 Ga. 606 (2001); *But see Association of Guineans in Atlanta, Inc. v. DeKalb County*, 292 Ga. 362 (2013) (finding that the zoning applicant failed to sufficiently raise its constitutional challenges before the local governing body because it did not use the terms "constitutional" or "unconstitutional" in its presentation or in any of its written submissions to the local government).
[14] *See RCG Properties, LLC v. City of Atlanta Bd. Of Zoning Adjustment*, 260 Ga. App. 355 (2003).

within their jurisdictions by the Georgia Constitution. Planning sets forth policy objectives for future growth and development which, in most jurisdictions, lack legally-binding requirements in zoning actions. As described by the Georgia Court of Appeals, planning "contemplates the evolvement of an over-all program or design of the present and future physical development of a total area and services."[15] Zoning is the regulatory tool used to implement and enforce short- and long-range planning objectives. For example, suppose a jurisdiction enacts a comprehensive land use plan which changes the land use designation of a certain property from office to mixed use. Assuming the jurisdiction does not require consistency with its comprehensive plan, which most do not, this change to the land use plan does not automatically alter development rights and permitted uses on the property, but rather evidences the jurisdiction's intent that future development on the property should be in accordance with mixed use standards and policies.

The Georgia Planning Act of 1989

In 1989, the General Assembly enacted the Georgia Planning Act[16] in an attempt to coordinate planning at the local, regional and state levels. The Act authorizes the "establishment, implementation, and performance of coordinated and comprehensive planning by municipal governments and county governments."[17] Specifically, the Georgia Planning Act authorizes local governments:

> (1) To develop, or to cause to be developed pursuant to a contract or other arrangement approved by the governing body, a comprehensive plan;
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> (2) To develop, establish, and implement land use regulations which are consistent with the comprehensive plan of the municipality or county, as the case may be;

[15] *Kingsley v. Florida Rock Industries*, 259 Ga. App. 207, 210, 576 S.E.2d 569 (2003).
[16] O.C.G.A. § 36-70-1 *et seq.*
[17] O.G.G.A. § 36-70-1.

(3) To develop, establish, and implement a plan for capital improvements which conforms to minimum standards and procedures and to make any capital improvements plan a part of the comprehensive plan of the municipality or county, as the case may be;

(4) To employ personnel, or to enter into contracts with a regional commission or other public or private entity, to assist the municipality or county in developing, establishing, and implementing its comprehensive plan;

(5) To contract with one or more counties or municipalities, or both, for assistance in developing, establishing, and implementing a comprehensive plan, regardless of whether the contract is to obtain such assistance or to provide such assistance; and

(6) To take all action necessary or desirable to further the policy of the state for coordinated and comprehensive planning, without regard for whether any such action is specifically mentioned in this article or is otherwise specifically granted by law.[18]

The Georgia Planning Act defines a "comprehensive plan" as "any plan by a county or municipality covering such county or municipality proposed or prepared pursuant to the minimum standards and procedures for preparation of comprehensive plans and for implementation of comprehensive plans established by the department."[19] A jurisdiction's "comprehensive plan" typically sets forth the official policies and guiding principles of a jurisdiction for future growth, and includes land use plans, community goals, capital improvement plans, transportation plans, economic development goals, and the like. Local implementation of a comprehensive plan is at the discretion of the local jurisdiction. Since Georgia conditions certain state funds on the existence of a comprehensive plan, however, many local governments have now adopted and implemented comprehensive plans.

A local government must be classified as a "Qualified Local Government" (QLG status) in order to be eligible for certain state funding and permitting programs.[20] Georgia law defines a

[18] O.C.G.A. § 6-70-3.
[19] O.C.G.A. 36-70-2.
[20] *See* O.C.G.A. § 50-8-7.1.

"qualified local government" for state funding and permitting programs as a county or municipality that:

> (A) has a comprehensive plan in conformity with the minimum standards and procedures;
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> (B) Has made its local plan implementation mechanisms consistent with those established in its comprehensive plan and with the minimum standards and procedures; and
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> (C) Has not failed to participate in the department's mediation or other means of resolving conflicts in a manner which, in the judgment of the department, reflects a good faith effort to resolve any conflict.[21]

Therefore, in order to maintain its "qualified local government" certification, each local government must prepare, adopt, maintain and implement a comprehensive plan that meets the State's minimum planning requirements.

The Georgia Planning Act authorizes the Department of Community Affairs ("DCA") to establish the "minimum planning standards" for the preparation of a comprehensive plan. Under such authority, the DCA has promulgated specific minimum standards that must be included in a comprehensive plan in order to maintain QLG status.[22] According to the DCA, comprehensive plans must contain three elements: (1) Community Goals;[23] (2) Needs and Opportunities;[24] and (3) Community Work Program.[25] Additional elements are required depending of the complexity and scope of the comprehensive plan, land development regulations, and economic goals of the local government. The DCA also requires that local governments hold at least two public

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[21] O.C.G.A. § 50-8-2(18).
[22] *See* Ga. Comp. R. & Regs. 110-12-1-.02. To attain "qualified local government" status, local governments must prepare, adopt, maintain and implement a comprehensive plan that satisfies the minimum planning standards set forth by the Department of Community Affairs. Qualified local governments are eligible for select state funding and permitting programs.
[23] Ga. Comp. R. & Regs. 110-12-1-.03(1).
[24] Ga. Comp. R. & Regs. 110-12-1-.03(2).
[25] Ga. Comp. R. & Regs. 110-12-1-.03(3).

hearings before the submission of a final draft of a comprehensive plan to a regional commission for review. The first public hearing must be held before the comprehensive plan is even developed to inform the public "about the purpose of the plan and the processes to be followed in the preparation of the plan . . ."[26] The second public hearing must be held prior to the submittal of the draft plan to the regional development center for review.[27] In addition to the public hearings, local governments also typically hold public meetings and charrettes throughout the development of the comprehensive plan, and subsequent updates and reviews to the plan, to ensure the plan reflects the goals, interests and concerns of the community. These meetings also offer local citizens an opportunity to influence future growth and policies within the community and region.

Legal Effect of the Comprehensive Plan and the Consistency Doctrine

Since zoning and planning are local government functions, the strength of a comprehensive plan varies by local jurisdiction. In some jurisdictions, the comprehensive plan is merely a guide for future growth and development, but has no binding legal effect on development rights or zoning decisions. In jurisdictions with more stringent growth management policies, zoning decisions may not be made in contravention of the comprehensive plan. This principle is known as the consistency doctrine and strict adherence to the comprehensive plan is mandated by local law.[28] For example, the City of Atlanta has adopted the consistency doctrine and requires that all zoning decisions be consistent with its comprehensive

[26] Ga. Comp. R. & Regs. R. 110-12-1-.04.
[27] Ga. Comp. R. & Regs. R. 110-12-1-.04(c).
[28] "Where a separate plan's existence is mandated and becomes a prerequisite to land use regulations, the jurisdiction is said to have adopted. . . the consistency doctrine." 1 Arden H. Rathkopf & Daren A. Rathkopf, Rathkopf's The Law of Zoning and Planning § 14:1 (2005). Oregon and Florida are two examples of states that employ the consistency doctrine.

plan. This means that if an applicant applies to zone property in Atlanta in a manner that is not consistent with the local comprehensive plan, and specifically the future land use map within the comprehensive plan, the applicant must also apply to amend the City's comprehensive plan to reflect the proposed zoning change.[29] Amendments to the zoning map and the comprehensive plan may be made at the same hearing, but technically speaking the comprehensive plan amendment must be approved before the rezoning request is approved so that the zoning change is consistent with the land use map in the comprehensive plan.

It should be noted, however, that even in jurisdictions that do not follow the consistency doctrine, local governing authorities and planning staffs routinely analyze zoning changes to determine conformity with the policy and intent of a comprehensive plan. For example, the City of Brookhaven does not require that zoning decisions be made in accordance with its comprehensive plan (i.e. consistency is not mandated by local law). However, the City's Zoning Code requires the City Council to review and make zoning decisions using seven criteria, the first of which is whether the zoning proposal is in conformity with the policy and intent of the Comprehensive Plan.[30] Therefore, practically speaking, even though the Comprehensive Plan does not carry the binding force of law in Brookhaven, it does influence the local government's decision as to whether to grant or deny a rezoning proposal.

The legal effect of the comprehensive plan also varies by jurisdiction. Two Georgia cases exemplify the varying legal effects of a comprehensive plan and the respective weight courts accord to the comprehensive plan. In the 2001 case of *City of Atlanta v. TAP Associates,*[31] the Georgia Supreme Court placed great emphasis on the City's comprehensive plan in

[29] City of Atlanta, Code § 16-27.004.
[30] City of Brookhaven, Code § 27-832.
[31] 273 Ga. 681, 544 S.E.2d 433 (2001).

determining the constitutionality of a rezoning denial.[32] The Court determined that the comprehensive plan was adopted "after extensive study and often contentious debate among the interested parties, including city planners, the business community, and neighborhood residents, about the best plan for managing the growth and development of the area."[33] The City's Plan envisioned that the property at issue would remain residential in character rather than transitioning to a more intense commercial use.[34] The Court construed the plan as governing future growth and therefore accorded the plan and the local government's decision to retain the residential zoning great deference.[35]

In contrast, Georgia courts have been unwilling to lend credence to comprehensive plans if consistency with those plans is not mandated or encouraged by local law. In the case of *Barrett v. Hamby*,[36] the Georgia Supreme Court found that the future land use map in Cobb County had no legal force as it was an aspirational tool rather than a comprehensive instrument governing future development patterns.[37] The County attempted to use the land use map in court as evidence to support its rezoning denial.[38] The Court rejected this argument and found the land use plan to be insufficient to support the government's position that the current zoning was substantially related to the public health, safety, morals and welfare.[39] The Court ultimately invalidated the zoning ordinance and ordered the local governing authority to zone the property to a constitutional zoning classification.[40]

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[32] *City of Atlanta v. TAP Associates*, 273 Ga. 681, 544 S.E.2d 433 (2001).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] 235 Ga. 262, 219 S.E.2d 399 (1975).
[37] *Barrett v. Hamby*, 235 Ga. 262, 264-265, 219 S.E.2d 399 (1975).
[38] *Id.*
[39] *Id.*
[40] *Id.*

Trends in Zoning and Land Use Law

The way local governments make land use and zoning decisions will continue to change in the years ahead. As populations continue to urbanize and expand, urban centers and traditional suburban nodes on the fringes of these centers will face new challenges in accommodating population increases, regulating mixed use development and introducing flexibility into antiquated zoning and land development codes. Local governments will also have to balance the desire for hyper-local control in land use decision-making and the realization that local land use controls are generally inadequate to deal with statewide and regional problems, such as water pollution, air pollution, transportation planning, and natural resource conservation. There seems to be a "growing awareness on the part of both local communities and statewide interests that states, not local governments, are the only existing political entities capable of devising innovative techniques and governmental structures to solve problems such as pollution, destruction of fragile natural resources, the shortage of decent housing, and many other problems which are now widely recognized as simply beyond the capacity of local governments acting alone."[41]

Overlay Zoning Districts

Overlay zoning districts have now been adopted and codified in many metropolitan Atlanta jurisdictions. Overlay districts are placed over one or more existing base zoning districts, such as a commercial or office-institutional districts, and may impose additional restrictions on permitted uses or development regulations (i.e. setbacks, height, etc.) or impose new design guidelines on streetscapes, building facades, landscaping and the like. Overlay districts can be a

[41] Patricia Salkin, The Quiet Revolution and Federalism: Into the Future, 45 John Marshall L. Rev. 253, 253 (2012).

valuable tool for local governments looking to implement specific goals and objectives of the community. The appeal of overlays is their flexibility. They allow local governments to maintain current zoning restrictions while addressing the special and often unique needs of particularly susceptible areas. Thus far, overlays have been used in Georgia to create incentive bonus programs, encourage mixed use development projects and innovative urban design standards, and preserve historic and natural resources.[42]

Overlay districts are created and governed by local ordinance and must be approved by a local governing authority. The local ordinance will specify what effect the overlay has on the existing restrictions in the underlying district, and the geographic boundary in which the overlay operates. It is important to note that overlay zoning districts do not replace the underlying base zoning district and cannot permit a land use that is otherwise prohibited by the underlying zoning district. Many jurisdictions are broadly interpreting overlay zones as substantive zoning districts that are separate and apart from the underlying use and development restrictions in the base zoning district. This interpretation leads to problems if the overlay zoning district permits a land use that is prohibited in the underlying base district.

Mixed Use Zoning Districts

We also see mixed use development continuing to be a popular and successful form of development into the future. In his book *Reshaping Metropolitan America*, Dr. Arthur (Chris) Nelson places significant emphasis on Generation Y and the Baby Boomers, noting that these generations will be the driving force behind future land development patterns in metropolitan areas by demanding walkable communities with transit access and a variety of uses rather than

[42] Seth Weissman, Doug Dillard and Jill Skinner. *Zoning and Land Use Law in Georgia.* Council for Quality Growth. p. 249.

isolated suburban nodes.[43] Mixed use districts typically combine a variety of land uses to create a master community with adjacent residential, commercial, retail, and public space uses. The idea behind the mixed use concept is that an individual would be able to live, work, and play in the same area, thus reducing the dependence on single-occupancy vehicles and encouraging social interaction.[44] Small and large-scale mixed use developments are accommodated through the utilization of special mapped or overlay districts.[45]

"A legal framework has to be created that can preserve the aesthetic appearance of such mixed use communities, resolve land use conflicts, accommodate some degree of individuality and freedom of expression, and provide for the short- and long-term operation of the community. The legal structure must also be sensitive to the unique realities of many new mixed use communities. Issues regarding odors, noise, traffic, increased density and the like must be properly planned for in mixed use communities as these problems often arise from the siting of dissimilar land uses next to one another."[46] These issues may be properly handled through private covenants enforced by an HOA or similar private entity, or through public zoning conditions placed on the approval of a mixed use community by a local government.

"Age in Place" Zoning

"Age in place" zoning will become a major topic of debate in the coming years as the Baby Boomer generation continues to age and seek smaller living spaces closer to grocery stores, health care facilities, and retail establishments. It is predicted that the Baby Boomers will

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[43] Arthur C. Nelson, *Reshaping Metropolitan America: Development Trends and Opportunities to 2030*. Island Press. p. 30.
[44] Seth Weissman, Doug Dillard and Jill Skinner. *Zoning and Land Use Law in Georgia.* Council for Quality Growth. p. 676.
[45] *See* Zeigler, 1 *Rathkopf's The Law of Zoning and Planning*, § 11:12.
[46]Seth Weissman, Doug Dillard and Jill Skinner. *Zoning and Land Use Law in Georgia.* Council for Quality Growth. p. 254.

account for nearly 20% of the national population by 2030.[47] The aging Boomers present one of the greatest challenges to current land use and zoning paradigms. Local jurisdictions are in the midst of a serious dilemma with their aging populations as most prefer to "age in place" and downsize into smaller homes or apartments within their communities rather than move away from their established social networks to find smaller housing, but cannot do so because of inflexible zoning regulations that do not allow a mixture of housing types or non-residential and residential services within the same area. To address this issue, some progressive jurisdictions have amended their zoning codes to allow for a variety of housing choices in residential zoning districts, such as smaller single-family residential houses, townhomes, and apartments, so that seniors can downsize and remain in their communities. We see this as a positive change to antiquated zoning codes that rigidly and unnecessarily separate a variety of residential land uses in a district.

[47] Arthur C. Nelson, *Reshaping Metropolitan America: Development Trends and Opportunities to 2030*. Island Press. p. 30.