THE APPEAL OF A LOCAL GOVERNMENT ZONING DECISION BY WRIT OF CERTIORARI TO THE SUPERIOR COURT

Presented by:

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I. INTRODUCTION.

Zoning suits are suits in equity and are heard in superior courts.[1] The typical challenge is a challenge to the constitutionality of a zoning ordinance, or a decision made at the local government level based on such an ordinance. While zoning appeals are frequently either brought as declaratory judgment or mandamus actions, the appeal of a zoning decision in these instances is a de novo review, and thus the aspect of the form often matters very little. The one exception is where the local government ordinance at issue requires that the appeal be made by writ of certiorari.[2]

While this procedure can be cumbersome as explained herein, there is reason for local governments to require that appeals be made by writ of certiorari. Mandamus, under O.C.G.A. § 9-6-20 et seq., has its own set of unique rules, including a very short timeframe for the hearing. Under O.C.G.A. § 9-6-27, a trial in a mandamus action must occur "not less than ten nor more than 30 days" from the date of the issuance of a mandamus nisi. Additionally, the defendant is only required to be served no later than five days before the date of the hearing. Id. Thus, the well-prepared applicant can get its case ready, and file mandamus and seek a quick hearing, leaving the local government little time to prepare. Therefore, by electing the writ of certiorari as the procedure for appeals, a local government can avoid the strict rules surrounding mandamus.

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[1] Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 178 (1981).
[2] Jackson v. Spalding County, 265 Ga. 792 (1995).

II. PROCEDURE.

A. STEP ONE: THE BOND AND CERTIFICATE OF PAYMENT OF COSTS.

The process of an appeal by writ of certiorari begins with the ordeal of giving a bond and obtaining a certificate from the officer whose decision or judgment you are appealing that all costs which may have accrued on the trial below have been paid.[3] Most commonly, the appropriate person to sign the certificate would be the chairperson or clerk of the body from which you are appealing. For example, an appeal from a zoning board of appeals denying an application for a variance would require a bond approved by a zoning board officer who heard the variance application case in the exercise of the Board's judicial powers.[4] Finally, the required bond must cover the amount sued for, as well as interest and future costs.[5] The lack of or invalidity of a bond may be cured by amendment.[6]

While at first blush this may seem like a mere formality, obtaining the attention and cooperation of the appropriate local government official can often be a challenge. If there are no fees or costs that have accrued in the action, it is nevertheless recommended that you obtain a signed certificate from the appropriate official making this clear. Keep in mind, a writ of certiorari must be applied for within 30 days. "Applications made after 30 days are not timely and shall be dismissed by the court."[7] Finally, if the party applying for the writ of certiorari is unable to pay the costs or give

[3] OCGA §§ 5-4-3 and 5-4-5.
[4] *See* Buckler v. DeKalb Cnty., 290 Ga.App. 190, 192 (2008).
[5] OCGA § 5-4-5(a); Gullat v. Blankenship, 42 Ga.App. 139 (1930).
[6] OCGA § 5-4-10.
[7] OCGA § 5-4-6(a).

security, the party may present an affidavit of indigence with the petition.[8] The affidavit must set forth that the party has good cause for certiorari, based on advice and belief.[9] In all cases where a party does not meet the requirements for presenting an affidavit of indigence, the party must otherwise give a bond and obtain a certificate as explained above.

B. STEP TWO: DRAFTING THE PETITION FOR WRIT OF CERTIORARI AND OBTAINING THE SANCTION OF THE SUPERIOR COURT JUDGE.

The next step is drafting the petition for writ of certiorari. The petition must distinctly set forth the errors complained of.[10] No ground of error will be considered by the Court if it is not distinctly set out in the petition.[11] Before being filed, the petition must also include the sanction of a superior court judge in the County in which the petition is to be filed.[12] When presented to the superior court judge for sanctioning, the petition must also be accompanied by a certificate from the officer whose decision or judgment is the subject matter of complaint that all costs on the trial below have been paid.[13] Once you have given an appropriate bond, obtained the certificate evidencing payment of the costs, and prepared the petition for writ of certiorari and the order sanctioning the writ of certiorari, the next step is to obtain a superior court judge's signature on the order sanctioning the writ. This does not require a hearing or notice, and is often accomplished in chambers. After obtaining the sanction or endorsement of

[8] OCGA § 5-4-5(c).
[9] OCGA § 5-4-5(c).
[10] OCGA § 5-4-3.
[11] OCGA § 5-4-12(a).
[12] OCGA § 5-4-3.
[13] OCGA § 5-4-5(a).

an appropriate superior court judge, the petitioner must file the petition for writ of certiorari in the office of the clerk of the superior court, along with the certificate of payment of costs and the order sanctioning the writ.[14]

C. STEP THREE: THE ISSUANCE OF THE WRIT.

Once the petitioner files the petition and other necessary documents, the clerk has a duty to issue a writ of certiorari directing the tribunal or person whose judgment is the subject matter of complaint to certify and send up all the proceedings in the case to the superior court.[15] "The writ of certiorari, when granted in civil cases, shall operate as a supersedeas of the judgment until the final hearing in the superior court."[16] Since the appeal by writ of certiorari is "limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence," proper transmission of the record is exceedingly important to all parties to the appeal.[17] As such, the appellant must be sure that the record is fully made at the initial local government hearing and is complete when transmitted to the superior court in response to the issuance of the writ.

[14] OCGA § 5-4-3.
[15] OCGA § 5-4-3.
[16] OCGA § 5-4-19.
[17] OCGA § 5-4-12(b).

D. STEP FOUR: SERVICE ON THE OPPOSING PARTIES.

A copy of the petition and writ must be served on the respondent within five days after it is filed with the clerk's office.[18] While the statute does not define the term "respondent," case law interpreting this provision makes clear that it is the judicatory decision-maker or body whose decision is being appealed.[19] The statute has also been construed to require personal service on the respondent, although such personal service can be accomplished either by the sheriff or his deputy or by the petitioner or his attorney.[20] Service by mail is insufficient.[21] In addition to serving the respondent, a copy of the petition and writ must be served on the opposite party or his counsel or legal representative.[22] Service on the opposite party can be accomplished in person or by mail.[23] Thankfully for the appellant, the remedy for the petitioner's failure to perfect service is a continuance.[24] It will not otherwise affect the validity of the proceedings.[25] Nevertheless, the statutes also require that an acknowledgement or certificate of service be filed to show service has been perfected.[26]

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[18] OCGA § 5-4-6(b).
[19] Fisher v. City of Atlanta, 212 Ga.App. 635, 635 (1994) (citing Bass v. City of Milledgeville, 121 Ga. 151; Gornto v. City of Brunswick, 119 Ga.App. 673; Johnson v. Hicks, 31 Ga.App. 43).
[20] OCGA § 5-4-6(b); Gornto, 119 Ga.App. at 673.
[21] Id.
[22] OCGA § 5-4-6(b)
[23] OCGA § 5-4-6(b); *see also* Gornto, 119 Ga.App. at 673.
[24] OCGA § 5-4-7.
[25] Id.
[26] OCGA § 5-4-6(b).

E. STEP FIVE: ENSURING THAT AN ANSWER IS FILED.

The answer to the writ of certiorari must be filed by the respondent in the clerk's office within 30 days after service.[27] A copy of the answer must be "mailed or delivered to the petitioner by the respondent or by the clerk of the superior court."[28] As odd as it may seem, the petitioner has a duty to ensure that the petitioner files a timely answer.[29] If the respondent fails to file an answer on time, the petitioner should move the superior court to order it filed.[30] A failure to do so can be deemed a failure to prosecute and result in dismissal of the certiorari.[31] In the event that the allegations of the respondent's answer are untrue, incomplete or otherwise insufficient, "[t]he petitioner or defendant in certiorari may traverse or except to the answer of the respondent, . . . in writing, specifying the defects, within 15 days after the filing of the answer; and, if the traverse or exceptions are sustained, the answer shall be perfected as directed by the court."[32] This is important because "where there is an answer filed, even though incomplete and insufficient, the same will be binding on the plaintiff in certiorari unless exceptions are filed . . . ."[33]

[27] OCGA § 5-4-7.
[28] Id.
[29] City of Atlanta v. Schaffer, 245 Ga. 164, 165-166 (1980) (superseded by statute on other grounds).
[30] Id.
[31] Id.
[32] OCGA § 5-4-9.
[33] Norris v. Sibert & Robinson, 53 Ga.App. 440 (1936).

F. STEP SIX: THE HEARING AND DECISION.

Certiorari cases shall be heard by the superior court in which it is filed without a jury, in chambers or in open court.[34] Only "reasonable notice" is required to be given to the parties, and the case may be heard at any time that the matters may be ready for hearing.[35] The one exception is "[w]here a traverse to the answer has been filed and jury trial demanded, the matter may be tried at any time a jury is available . . . ."[36] At the hearing, "[n]o ground of error shall be considered which is not distinctly set forth in the petition."[37] Additionally, "[t]he scope of review shall be limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence."[38] After a tortured history through the appellate courts, the term "substantial evidence" is now effectively the same as the "any evidence" standard.[39]

After the hearing, the superior court may either order the writ of certiorari be dismissed, or it may remand the appeal to the court from which it came with instructions.[40] However, where the error complained of is a matter of law which is dispositive to the appeal, "and the court is satisfied that there is no question of fact involved which makes it necessary to send the case back for a new hearing before the

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[34] OCGA § 5-4-11(a).
[35] Id.
[36] OCGA § 5-4-11(b).
[37] OCGA § 5-4-12(a).
[38] OCGA § 5-4-12(b).
[39] City of Atlanta Gov't. v. Smith, 228 Ga.App. 864, 865 (1997).
[40] OCGA § 5-4-14(a).

tribunal below, it shall be the duty of the judge of the superior court to make a final decision in the case without sending it back to the tribunal below."[41]

If the plaintiff is successful on his writ of certiorari and obtains a final judgment in the superior court, the plaintiff may have judgment entered: (1) for the amount recovered by him in the court below; (2) the costs paid to obtain the certiorari; and (3) the costs in the superior court.[42] "If the certiorari is returned to the court below for a new hearing, the plaintiff shall have judgment entered for the costs in the superior court only, leaving the costs paid to obtain the certiorari to be awarded upon the final trial below."[43] On the other hand, if the defendant is successful in obtaining a final judgment dismissing the writ of certiorari in the superior court, the defendant in certiorari may have judgment entered in the superior court against the plaintiff and his posted bond for: (1) the sum recovered by him below; and (2) the costs in the superior court.[44] Finally, if "a certiorari was frivolous and was applied for without good cause or only for the purpose of delay, the presiding judge before whom the writ was heard, on motion of the opposite party, may order that damages totaling not more than 20 percent of the sum adjudged to be due be recovered by the defendant . . . against the plaintiff. . . and his security."[45]

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[41] OCGA § 5-4-14(b).
[42] OCGA § 5-4-16.
[43] Id.
[44] OCGA § 5-4-17.
[45] OCGA § 5-4-18.

III. SUMMARY.

As you can see, the procedure involved in appealing a local government decision by writ of certiorari is far from simple. The process for requesting certiorari to the superior courts first appeared in the Georgia Code of 1863. While the antiquated nature of the procedure may be partly to blame for its complexity, the upside is that there exists a wealth of case law from the past 150 years providing guidance to those undertaking this process. A careful reading of the statutes and applicable cases should permit you to navigate the rocky waters surrounding this process with confidence.