Georgia Association of Zoning Administrators

Summer Conference

August 19, 2016

Key Issues in Making Zoning & Land Use Decisions

by

FRANK E. JENKINS, III

JENKINS & BOWEN P.C.
ATTORNEYS AT LAW

15 South Public Square
Cartersville, Georgia 30120

fjenkins@ga-lawyers.pro
www.GA-Lawyers.pro
(770) 387-1373

I. CONDUCTING ADMINISTRATIVE HEARINGS

A. Provide the required notice of the hearing as set forth in the local ordinance.

B. Establish written procedures for conduct of the hearing and provide a copy to all attendees.

The recommended procedures are as follows:

1. Allow the applicant to make the first presentation.
2. Provide for witness testimony.
3. Allow for cross-examination by interested parties (require interested parties to be represented by someone).
4. Allow interested parties to introduce evidence.
5. Allow cross-examination of the interested parties by applicant.
6. Require that all documents be marked as exhibits.
7. Upon conclusion of the hearing for each application, make a decision.
8. Reduce all decisions to writing.

Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995).

C. Prepare a record or file for each application which should include the application and any documents introduced or provided as exhibits and the transcript of the hearing. It is especially important that this be prepared in the event of an appeal.

D. Have a professional staff member explain the case to the board. Allow him or her to be examined as appropriate by the applicant or interested parties.

The professional staff may make a recommendation of a desired result, but it is not required.

E. Provide the same file to the applicant as is provided to each board member. Make sure each board member has a copy of the file prior to the hearing. Make the file available to the parties interested upon request.

F. Have the official zoning map and future land use plan present at the hearing for use by anyone at the hearing.

G. Record the public hearing, either by a tape recorder or a court reporter. If the case is appealed, prepare a transcript.

On appeal, the Superior Court only reviews the record of the hearing before the local government; no new evidence is presented.

II. APPEAL AND COURT REVIEW OF ADMINISTRATIVE DECISIONS

A. Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995).

The property owners appealed the denial of a variance by the county and challenged the county's ordinance which required appeals to the superior court by writ of certiorari and contended that they were not afforded a due process hearing before the county's board of appeals.

The court concluded that the county's ordinance may specify the proper judicial vehicle for appeals of administrative decisions on variances. In this case, the county's ordinance required that the disappointed property owner travel by way of writ of certiorari from the board of appeals to the superior court. This is because the decision-making process by the board of appeals is the nature of a judicial act; that means that

the board of appeals determines the facts from the evidence and applies the ordinance's legal standards to those facts to reach a decision.

The court rejected the plaintiffs' contention that they were denied a due process hearing before the board of appeals. The court found that the due process requirements were met in that: (1) the board gave notice of the hearings; (2) the plaintiffs were allowed to explain their reasons for requesting the variance; (3) they presented evidence in support of the application, "including letters, photographs, plats, and schedules of property values in the community"; (4) they answered questions from board members; (5) a verbatim transcript or detailed account of the hearing was available and formed an adequate basis for judicial review; and (6) the board explained to the plaintiffs the reasons for the denial and put that in writing. The plaintiffs further asserted that they were denied the opportunity to cross-examine witnesses, but that was rejected by the court because the plaintiffs never sought the opportunity to cross-examine witnesses. However, this suggests that a property owner, or indeed an interested party in opposition to the grant of a permit, should have the opportunity to present testimony by witnesses and to cross-examine witnesses to satisfy due process requirements.

B. <u>City of Dunwoody v. Discovery Practice Management, Inc.</u>, ____ Ga.App. ____ (Ga. Ct. of App., decided July 14, 2016).

1. Court reviews only the record of the proceedings before the local government administrative agency.
2. The superior court reviews an administrative decision under the any evidence standard of review on appeal.

3. Construction of the meaning of the ordinance is a question of law for the court.

4. A local government ordinance will be strictly construed by the court in favor of the property owner and never extended beyond its plain meaning.

5. Where an ambiguity exists in a zoning ordinance, it will be construed in favor of the property owner.

C. Druid Hills Civic Association Inc. v. Buckler, 328 Ga.App. 485 (decided July 10, 2014).

In administrative or quasi-judicial decisions (such as a variance or building permit), no new evidence may be introduced to the court or otherwise admitted into evidence. The only evidence to be considered by the court is that introduced at the administrative hearing before the local governing board or agency.

Standing of a party to appeal a local government decision shall be based on whether the person or entity appealing the decision has a substantial interest in the zoning board's or agency's decision such that the applicant would suffer some special damage as a result which is not common to other property owners similarly situated. An applicant who fails to object to the standing of an opponent at the administrative hearing may not object for the first time in superior court.

D. Time Limitations for Filing an Appeal from the Local Government Administrative Agency to the Superior Court

Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).

A suit challenging a local government zoning decision must be filed in the superior court within 30 days of that decision.

Chadwick v. Gwinnett County, 257 Ga. 59 (1987).

30-day window for filing appeal of zoning decision begins to run when the decision is reduced to writing and signed by the authorized official.

III. NONCONFORMING USES

City of Dunwoody v. Olympus Media, LLC, 335 Ga.App. 62 (2015).

A. Nonconforming uses are uses which are existing prior to the enactment of an ordinance rendering them nonconforming. For a use to be nonconforming within the meaning of a statute, it must be a legal use; a prior use which was not a legal use under the applicable ordinance cannot be a legal nonconforming use.

B. **Henry v. Cherokee County, 290 Ga.App. 355 (2008).**

To prohibit a nonconforming use from expanding on the same lot, an ordinance should provide the following: "No such non-conforming use of land shall in any way be extended, either on the same or joining property."

IV. ENFORCEMENT OF ZONING CONDITIONS

Cherokee County et al. v. Martin, 253 Ga.App. 395, 559 S.E.2d 138 (2002).

"Rezoning is conditional only if the conditions are set forth in the rezoning resolution itself or if an examiner of the resolution would be alerted to the existence of such conditions."

V. VESTED RIGHTS

A. Café Risqué/We Bare All Exit 10, Inc. v. Camden County, 273 Ga. 451, 542 S.E.2d 108 (2001).

Where a local government issues a permit which is in violation of an existing ordinance, even if issued under a mistake of fact, the permit is void and the holder does not acquire any vested rights. This is true even if substantial expenditures were made in reliance on the void permit. A local government is not prohibited from revoking an improperly issued permit.

B. North Georgia Mountain Crisis Network, Inc. v. City of Blue Ridge, 248 Ga.App. 450, 546 S.E.2d 850 (2001).

A land use that is merely contemplated for the future but unrealized as of the effective date of a new zoning regulation does not constitute a nonconforming use. A property owner may acquire a vested right to use property where he makes a substantial change in position by expenditures in reliance on the probability that a building permit will issue or based upon an existing ordinance and the assurances of zoning officials. But where the only change in position is the purchase of the property itself, the purchase does not confer a vested right to a particular use by the purchaser.

C. Meeks v. City of Buford, 275 Ga. 585, 571 S.E.2d 369 (2002).

The issue in this case is whether a property owner obtained a vested right to use undeveloped investment property in accordance with a variance granted in 1985 – 14 years earlier. In finding the earlier variance no longer valid, the court relied on the rule that a property owner must make a substantial change in position or make substantial expenditures or incur substantial obligations in order to acquire a vested right. In this case, the mere reliance on a variance without showing substantial change in position by expenditures or other obligations does not vest a right in the land owner to develop in accordance with the earlier variance which would no longer be valid by virtue of a subsequently adopted zoning ordinance.

D. Cooper v. Unified Government of Athens-Clarke County, 277 Ga. 360, 589 S.E.2d 105 (2003).

A property owner claiming a vested right to use property must make that claim to the local government before an appeal is made to the superior court. A claim of vested right to use property may not be made for the first time in superior court.

E. Union County v. CGP, Inc., 277 Ga. 349, 589 S.E.2d 240 (2003).

The issuance of a building permit results in a vested right only when the permit has been legally obtained, is valid in every respect, and has been validly issued. Where a permit was issued to build a subdivision which was in violation of the flood control ordinance, the permit was not valid and the developer did not obtain a vested right to complete the subdivision.

F. Cohn Communities, Inc. v. Clayton County, 257 Ga. 357, 359 S.E.2d 887 (1987).

"The rule in Georgia is that where a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit." The expenditure of $600.00 was not substantial and thus did not accord the developer of a proposed multi-family building a vested right.

G. Corey Outdoor Advertising, Inc. v. The Board of Zoning Adjustments of the City of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (1985).

Property owner did not obtain a vested right to build a sign even though the city issued a permit if the permit was invalided because the location of the sign violated the sign ordinance.

VI. OFFICIAL ZONING MAP MUST BE ADOPTED AS PART OF THE ZONING ORDINANCE

Newton County v. East Georgia Land and Development Company, LLC, 296 Ga. 18, 764 S.E.2d 830 (2014).

An official zoning map is an integral part of a zoning ordinance as it identifies the lands to which the various zoning classifications apply. Therefore, adoption of the text of the zoning ordinance without adopting an official zoning map invalidates the zoning ordinance. To properly adopt an official zoning map along with a zoning ordinance: 1) it must be sufficiently identified so there is no uncertainty as to what was adopted; 2) it must be made a public record; 3) it must be accessible to members of the public; and 4)

the adopting resolution must give notice of the official zoning map's accessibility. The incorporation of a zoning map into the text of the zoning ordinance is met when the local government's minutes show that it had the official zoning map before it at the time it considered the ordinance. The best practice in properly identifying and authenticating the official zoning map is for the text of the zoning ordinance to show that the official zoning map incorporated into the zoning ordinance is labeled as the "official zoning map of _____," is dated on the date of its adoption, and is signed by an official of the local government, such as the mayor, chairman of the board, or clerk of the local government.

VII. ETHICAL CONSIDERATIONS IN ZONING DECISIONS

A. CONFLICT OF INTEREST IN ZONING ACT, O.C.G.A. Chapter 36-67(A)

1. DISCLOSE/DISQUALIFY

   - Public Officials
   - Applicants/Attorneys
   - Opposition/Attorneys

2. WHEN?

   - Only Rezoning

3. WHICH PUBLIC OFFICIALS?

   - Planning Commission
   - Governing Authority
     - Mayor
     - Council
     - County Commission

4. PUBLIC OFFICIALS

- Any ownership interest
  - Disclose and disqualify
- Financial Interest in entity with any ownership
  - Financial interest = 10%
  - Disclose and disqualify
- Family members with ownership or financial interest
  - Family = spouse, mother, father, sister, brother, son, daughter
  - Disclose
- Campaign contributions
  - None

5. APPLICANT

- Applicant or attorney
- Campaign gifts or contributions totaling $250
- 2 years preceding the zoning application
- File within 10 days of application

6. OPPOSITION

- Opposition/attorney
- $250
- File 5 days prior to the hearing
- 2 years preceding application

B. ADDITIONAL ETHICAL ISSUES IN LOCAL GOVERNMENT LAND USE DECISIONS

1. Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984).

Evidence that one member of the board of commissioners sold all the sand to a zoning applicant used in his business and another commissioner did all the applicant's gutter work was sufficient to find fraud and corruption in commissioners' vote to approve zoning for the applicant.

2. Olley Valley Estates, Inc. v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974).

The issue before the court is whether a commissioner ". . .had a direct or indirect financial interest in the outcome of the zoning vote—an interest which was not shared by the public generally, and which was more than remote or speculative." A judicial inquiry into the circumstances of the conflict of interest of the commissioner is proper even though the bias of the commissioner was not raised in the zoning hearing before the board of commissioners.

3. Vickers v. Coffee County, 255 Ga. 659, 340 S.E.2d 585 (1986).

A county commissioner had a conflict of interest when he voted to purchase a tract of land for use by the county as a landfill. Three tracts were under consideration by the county for the landfill. The two tracts rejected by the county were in close proximity to a tract of land co-owned by the commissioner which he intended to develop as a subdivision. The commissioner admitted in testimony that the proximity of the two rejected tracts would affect the value of his land and his ability to sell lots in the subdivision. The Supreme Court found that the effect on the commissioner's pecuniary interest was direct and immediate. Because of this conflict of interest, the court voided the vote by the county to purchase the third tract under consideration for its landfill.

4. Dunaway v. City of Marietta, 251 Ga. 727, 308 S.E.2d 823 (1983).

The chair of the city planning commission who was also an officer of the corporation applying for rezoning may have tainted the proceedings although he only presided at the planning commission hearing on the application, but did not vote.