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Update on Zoning Decisions and The "Tiny House" Movement

by

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I. ZONING APPEALS TO THE APPELLATE COURTS REQUIRE A DISCRETIONARY APPLICATION

Schumacher v. City of Roswell, 337 Ga.App. 268, 787 S.E.2d 254 (2016).

Appellants challenged Roswell's approval of a new zoning ordinance and map that rezoned their properties. Specifically, the Appellants challenged the manner in which the city council had approved the recently adopted UDC and map alleging that it violated the Georgia ZPL, O.C.G.A. § 36-66-1 et seq. and the Plaintiffs' due process rights under the state and federal constitutions among other violations. They also sought declaratory judgment and injunctive relief prohibiting enforcement of the UDC. After the trial court granted Roswell's motion for judgment on the pleadings, the Plaintiffs filed a direct appeal challenging only the dismissal of their state and federal constitutional due process claims. Upon motion, the Court of Appeals dismissed the Plaintiffs' appeal on the ground that the Plaintiffs were required to file an application for discretionary review whereas the Plaintiffs pursued appeal by direct appeal. In its decision, the court reviewed the seminal case on appeals of zoning decisions, Trend Development Corporation v. Douglas County, 259 Ga. 425, 383 S.E.2d 123 (1989). In Trend, the Supreme Court held that an appeal of a zoning decision is an appeal of an administrative decision, thus as provided in O.C.G.A. § 5-6-35(a)(1) the appeal to the appellant courts must be by discretionary application. This rule requiring discretionary application applies not only to the cases where the party appeals directly to the superior court from a zoning decision, but also where a party collaterally attacks the local

government's zoning decision by filing an action for mandamus, declaratory judgment, or injunctive relief. The court concluded that although the challenge by the Plaintiffs was to the UDC on constitutional due process and other grounds, it nonetheless was an appeal from a superior court's review of a local government zoning decision, thus requiring appeal by discretionary application. This rule obtains even though the action is a facial challenge to the city's zoning ordinance and not to a zoning decision specific to a single parcel of land. The only exception to the rule requiring discretionary application is where the plaintiff who challenges the zoning decision was not a party and could not have been a party in the local government's zoning proceeding. But, in this case where the public is invited to participate in the hearing before the local government, the Plaintiff is deemed to have been a party or could have been a party to the procedures before the city. Thus, the exception to the discretionary appeal requirement for "non-parties" to administrative zoning proceedings did not apply.

Interestingly, in Judge Rickman's concurring opinion, he questioned whether the "fallacies in the rational in [Trend Development Corp. v. Douglas County]" remain viable. (Citation omitted). Judge Rickman's concurring opinion raised the question of whether a local legislative body, such as a city council, in adopting a zoning ordinance was acting as an administrative agency versus a legislative agency. Thus, he questioned whether a decision such as the one before the court was an administrative decision which required discretionary application under O.C.G.A. § 5-6-35(a). But since the court is bound to follow the decision of the Supreme Court, the Court of Appeals must follow precedence.

II. 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."

III. APPEAL AND 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.

6. Unless required by local ordinance, due process does not require that neighboring property owners be given notice of a homeowner's permitted use of property as a matter of right where the decision did not authorize a non-permitted use of land or any variance or exception from permitted uses or deprived the neighboring property owners of life, liberty, or property. If an administrative decision approves a use not authorized by the ordinance, neighboring property owners have a remedy in a separate action challenging the decision and seeking an injunction, even though a neighboring property owner is without notice and fails to appeal an administrative decision to the superior court.

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.

IV. 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. 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.
2. Allow the applicant to make the first presentation.
3. Provide for witness testimony.
4. Allow for cross-examination by interested parties.
5. Allow interested parties to introduce evidence.
6. Allow cross-examination of the interested parties by applicant.
7. Require that all documents be marked as exhibits.
8. Upon conclusion of the hearing for each application, make a decision.
9. 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. 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.

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

F. 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.

V. STANDING TO CHALLENGE A GOVERNING AUTHORITY'S DECISION TO REZONE PROPERTY

Hancock v. Gwinnett County, Georgia, 2016 WL1162519 (N.D.Ga., 2016)

Standing to challenge a rezoning of property requires a substantial interest in a zoning decision and that the special interest is in danger of suffering some damage or injury not common to other property owners similarly situated. Claims of nuisance including traffic, noise, and increased crime do not constitute special damages sufficient to show standing. Conclusory allegations that Plaintiffs will suffer unique and special damage not common to other property owners will not confer standing.

Plaintiffs' allegations of complete destruction of their property rights without payment of just and adequate compensation in violation of the Constitution of the state of Georgia 1983 and Due Process Clause of the Fourteenth Amendment are not

sufficient to assert a takings claim where Plaintiffs failed to allege facts that would support such conclusion. They do not allege facts supporting their inability to access their property, build on their property, develop their property, or any other activity that the county's approval of nearby zoning has prevented them from enjoying. As Georgia law provides a procedure for obtaining compensation for inverse condemnation, the Plaintiffs' federal takings claim filed contemporaneous with their state law claim are not ripe for adjudication. Further, the 11th Circuit has held that land use rights such as contemplated by Plaintiffs in this case are created by state law and not entitled to substantive due process protection. Defendants' motion to dismiss was granted.

VI. TINY HOUSE MOVEMENT AND LOCAL GOVERNMENT ZONING LAWS

Living in tiny houses is a social movement of recent vintage. The typical American home is approximately 2,600 square feet in size. On the other hand, a tiny home, sometimes referred to as a micro home, is typically between 100 and 400 square feet. The most popular reasons for living in tiny homes are environmental, financial, time, freedom, and mobility.[1]

The tiny house may be built with traditional construction, but many use diverse construction or unit forms of various types in a variety of shapes and sizes, including multi-level houses, shipping containers, modular, prefab apartments, and pods.[2]

[1] "What is the tiny house movement?" Thetinylife.com. Other sites available for additional information on the tiny house movement are tinyhousetalk.com, tinyhousenewsletter.com, thetinylife.com, houzz.com/ tinyhouses, and Tiny House magazine (only in pdf format).
[2] "The promises and pitfalls of micro-housing" by Tim Iglesias, 37 #10 Zoning and Planning Law Reports NL1, November 2014.

Many if not most zoning ordinances in Georgia mandate minimum building sizes for residential dwellings in residential zoning districts. A local zoning ordinance may have different minimum residential dwelling sizes in zoning districts providing typically the highest minimum dwelling sizes in the more affluent residential zoning districts. Few residential zoning districts in zoning ordinances in Georgia, at least in this author's experience, allow dwelling units as small as the size of tiny houses or micro-houses.

Regulation of minimum size dwelling units in zoning ordinances is solely a matter of local government legislative discretion.[3] And if a local government intends to allow tiny houses in its discretion, it should make the following determinations:

1. What zones to allow for tiny houses
2. Decide allowable density
3. Define planning and construction standards:
    a. Minimum square footage
    b. Height standards
    c. Lot coverage
    d. Minimum lot size
    e. Required amenities
    f. Parking
    g. Landscaping and other exterior improvements
    h. Permissible kinds of construction

[3] "The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning." GA Const. Art. 9, § 2, Para. IV.

i. Whether to allow the tiny home to rest on wheels or require a permanent foundation.

Challenges to local zoning ordinances which prohibit tiny houses may rest upon constitutional principles applied to land use, such as failed justification to meet health, safety, morality, and general welfare requirements. The other challenge, likely in the offing, is under the Fair Housing Act.[4] The Fair Housing Act may impact zoning ordinances that prohibit tiny houses in any residential zoning districts. Under the disparate-impact theory applicable under the Federal Housing Act, "[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that 'arbitrar[ily] ... operate[s] invidiously to discriminate on the basis of rac[e].'"[5] No longer is intent to discriminate necessary to find a violation under the Fair Housing Act. It is thus the argument against local government zoning ordinances that failure to provide for tiny houses in residential zoning ordinances results in invidious discrimination based on race in failing to provide for low-income housing and resulting in continued racial segregation in housing.

Local governments in Georgia will likely be pressed to consider whether accommodations should be made for tiny housing requests. It could be in the form of zoning ordinances authorizing a tiny house sizes, or a percentage of tiny houses or apartments within a development, or possibly tiny houses permitted under special use permits which specify certain conditions for permitted tiny houses.

[4] 42 USC § 36-01 et seq.
[5] Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507 (2015) at p. 2524.

Recognizing that the tiny house movement is gaining popularity, especially among millennials, local governments, especially those in urban areas, should consider ways in which tiny houses may be approved and thus permitted under their zoning ordinances.