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# Zoning and Land Use Law

by Newton M. Galloway\*

and Steven L. Jones\*\*

## I. INTRODUCTION

With the close of the survey period for the seventy-first (71st) volume of the Mercer Law Review, development throughout the State of Georgia continued to thrive. While traditional brick-and-mortar commercial development is evolving, residential and industrial development remains steady. As a result, zoning challenges continued to present issues for resolution by Georgia's appellate courts. This Article identifies important zoning and land use decisions of the Georgia Supreme Court (supreme court) and Georgia Court of Appeals (court of appeals) issued between June 1, 2018 and May 31, 2019.<sup>1</sup>

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1. For an analysis of zoning and land use law during the prior survey period, see Newton M. Galloway & Steven L. Jones, *Zoning and Land Use Law, Annual Survey of Georgia Law*, 70 MERCER L. REV. 301 (2018). This Article does not address every interesting or germane zoning decision rendered during the survey period. The following cases are of note: *The Quarters Decatur, LLC v. City of Decatur*, 347 Ga. App. 723, 820 S.E.2d 741 (2018) (discussing when a property owner has “vested rights” under the current ordinance and approvals to prevent subsequent ordinance amendments from affecting the rights of the property owner); *Morgan Cty. v. May*, 305 Ga. 305, 824 S.E.2d 365 (2019) (invalidating an unconstitutionally vague zoning ordinance that, as applied, did not afford “a person of ordinary intelligence fair warning that [short term rentals of single family homes are] forbidden . . . sufficient specificity so as not to encourage arbitrary and discriminatory enforcement.”); *Johnson v. City of Atlanta*, 348 Ga. App. 216, 820 S.E.2d 257 (2018) (an interesting annexation case cabined to the facts of the case); *Fulton Cty. v. City of Atlanta*, 305 Ga. 342, 825 S.E.2d 142 (2019) (same). This Article also does not review cases involving condemnation, nuisance, trespass, easement, or restrictive covenants.

Generally, the decisions by Georgia's appellate courts in zoning related cases continued the transformation of legislative "zoning decisions" defined by Georgia's Zoning Procedures Law (ZPL)<sup>2</sup> into quasi-judicial, administrative actions, imposing greater procedural and evidentiary requirements for zoning hearings and superior court appeals. However, with respect to quasi-judicial zoning decisions, the appellate courts applied the "any evidence" rule to give greater weight to lay witness opponents and greater deference to local governments. As discussed herein, these simultaneous trends are contradictory and problematic because zoning hearings have never been conducted in a manner comparable to administrative law proceedings. As a result, notable cases decided during the survey period were delivered by splintered divisions of the court of appeals, resulting in only physical precedents.<sup>3</sup> To begin, this Article addresses important legislative developments related to the application of sovereign immunity to actions brought against local government officials in zoning decisions.

## II. APPEALS TO SUPERIOR COURT

### A. Sovereign Immunity: *Lathrop v. Deal*, HB 311 and Governor Kemp's Veto

In *Lathrop v. Deal* (discussed in last year's survey),<sup>4</sup> a super majority of the Georgia Supreme Court held that sovereign immunity extends to constitutionally-based claims barring all causes of action against the state "including suits for injunctive and declaratory relief from the enforcement of allegedly unconstitutional laws" and bars actions against local government officials acting within the authority of their official capacities.<sup>5</sup> Applied to a zoning case, the rule from *Lathrop* bars actions against city and county officials acting within the authority of their official positions, but it allows a claim to proceed against officials in their individual capacities.<sup>6</sup>

The supreme court in *Lathrop* reiterated that sovereign immunity may only be waived by the legislature or constitutional amendment.<sup>7</sup> So, the legislature responded in 2019 when both chambers of the

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2. O.C.G.A. §§ 36-66-1–36-66-6 (2019).

3. GA. CT. APP. R. 33.2(a). An opinion of the court is binding precedent if all three judges on the panel fully concur. An opinion is physical precedent (though citable as persuasive) if there is a dissent.

4. 301 Ga. 408, 801 S.E.2d 867 (2017).

5. *Id.* at 444, 801 S.E.2d at 892.

6. *See id.* at 422, 434, 801 S.E.2d at 877, 885; *see also* GA. CONST art. IX, § 2, para. 9.

7. *Lathrop*, 301 Ga. at 419, 801 S.E.2d at 876.

Georgia General Assembly passed House Bill 311<sup>8</sup> with zero “Nay” votes.<sup>9</sup> HB 311 approved a waiver of sovereign immunity for any claim seeking declaratory or injunctive relief in an action against a state or local government official or employee, in their official capacity, challenging enforcement of an unconstitutional state statute or an unconstitutional or illegal local government ordinance or action.<sup>10</sup>

HB 311’s waiver of sovereign immunity was strictly limited to claims such as those raised in *Lathrop* and which are typically asserted in a zoning case against county commissioners or municipal council members alleging that a zoning ordinance or decision violates the applicant(s)’s or owner(s)’s constitutional rights. Above all, HB 311 granted Georgia citizens the ability to address unconstitutional laws by seeking declaratory or injunctive relief against state and local government officials in their official capacities.<sup>11</sup> But, Governor Kemp vetoed HB 311; therefore, without a sovereign immunity waiver from the General Assembly, the issues unresolved after the decision in *Lathrop* continue.<sup>12</sup>

*B. Expansion of City of Cumming v. Flowers: York v. Athens College of Ministry, Inc.*

In *City of Cumming v. Flowers*,<sup>13</sup> the Georgia Supreme Court held that (regardless of the appeal method prescribed in the local government’s zoning ordinance) a “quasi-judicial” decision by a local government official, board, or governing authority must be appealed by writ of certiorari to the superior court.<sup>14</sup> A variance was at issue in *Flowers*, but dicta therein suggested that the supreme court might apply its holding to an appeal of a decision involving “special approval,” known also as a special exception, special permit, special use permit, or conditional use (collectively, SUP).<sup>15</sup> The court of appeals applied the holding of *Flowers* in *York v. Athens College of Ministry, Inc.*<sup>16</sup>

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8. Ga. H.R. Bill 311, Reg. Sess. (2019) (unenacted). HB 311 was authored by Representative Welch (R. McDonough) and sponsored by Senator Kennedy (R. Macon). Both legislators are attorneys.

9. Ga. H.R. Bill 311, Reg. Sess. (2019), available at <http://www.legis.ga.gov/legislation/en-US/Display/20192020/HB/311>.

10. *Id.* §§ 1-1–2-1.

11. *Id.*

12. *Id.*

13. 300 Ga. 820, 797 S.E.2d 846 (2017).

14. *Id.* at 833, 797 S.E.2d at 857.

15. *Id.* at 827 n.5, 797 S.E.2d at 853 n.5.

16. 348 Ga. App. 58, 821 S.E.2d 120 (2018).

A SUP allows land uses that are not permitted within a zoning district as a matter of right but may be compatible with permitted uses allowed in the zoning district at a specific location.<sup>17</sup> In other words, “the ordinance provides that [the SUP] shall be allowed only upon the condition that it be approved by the appropriate governmental body” pursuant to analysis of approval criteria set out in the ordinance.<sup>18</sup> ZPL specifically identifies “[t]he grant of a permit relating to a special use of property”—in other words, approval of a SUP—as a “final legislative” zoning decision.<sup>19</sup>

The distinction between a legislative local government decision and a quasi-judicial decision is critically important. A legislative decision is a “general inquiry” not bound to specific circumstances, facts, people, or property; rather, it “results in a rule of law or course of policy that will apply in the future.”<sup>20</sup> An appeal of a legislative zoning decision is direct, and the standard of review is *de novo*.<sup>21</sup> Therefore, the petitioner (usually, the zoning applicant whose request was denied) may introduce new evidence, including expert testimony, arguments, and issues to the superior court that were not presented in the zoning hearing below.<sup>22</sup>

In contrast, a quasi-judicial decision applies facts to criteria set forth in black-letter law and results in the establishment of rights and obligations or resolves specific disputes.<sup>23</sup> A quasi-judicial decision “is tightly controlled by the ordinance.”<sup>24</sup> A quasi-judicial decision is appealed by writ of certiorari from a decision of an inferior tribunal (in zoning cases, usually the local governing body), and the superior court sits as an appellate judiciary.<sup>25</sup> The “any evidence” standard applies, limiting the superior court’s review to the facts, evidence, and issues raised before the local governmental body or official.<sup>26</sup>

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17. *Id.* at 62, 821 S.E.2d at 125.

18. *City of Atlanta v. Wansley Moving & Storage Co.*, 245 Ga. 794, 794, 267 S.E.2d 234, 235 (1980), *overruled in part by Flowers*, 300 Ga. 820, 797 S.E.2d 846.

19. O.C.G.A. § 36-66-3(4)(e) (2019).

20. *York*, 348 Ga. App. at 60, 821 S.E.2d at 123 (quoting *Diversified Holdings, LLP, v. City of Suwanee*, 302 Ga. 597, 601–02, 807 S.E.2d 876, 882 (2017)).

21. *Stendahl v. Cobb Cty.*, 284 Ga. 525, 526, 668 S.E.2d 723, 726 (2008).

22. *Id.* at 527, 668 S.E.2d at 726.

23. *York*, 348 Ga. App. at 60, 821 S.E.2d at 123.

24. *RCG Properties, LLC v. City of Atlanta Bd. of Zoning Adjustments*, 260 Ga. App. 355, 361, 579 S.E.2d 782, 787 (2003) (a SUP case) (quoting *LaFave v. City of Atlanta*, 258 Ga. 631, 632, 373 S.E.2d 212, 213 (2003) (a variance case)).

25. *City of Dunwoody v. Discovery Practice Mgmt., Inc.*, 338 Ga. App. 135, 138, 789 S.E.2d 386, 389 (2016). “The substantial-evidence standard [under O.C.G.A. § 5-4-12(b)] is effectively the same as the any-evidence standard.” *Id.*

26. O.C.G.A. § 5-4-12(b) (2019); *York*, 348 Ga. App. at 63, 821 S.E.2d at 125.

Adoption of a zoning ordinance and map have long been held to be legislative.<sup>27</sup> The rezoning of a specific parcel has also been deemed legislative because approval of rezoning amends the zoning map, which is part of the zoning ordinance.<sup>28</sup> Decisions on variances, plat approval (preliminary and final), and approval of building and construction permits have historically been deemed quasi-judicial because they do not amend the local government's zoning ordinance.<sup>29</sup>

Before 1998, SUPs were not included within the definition of a "zoning decision" under ZPL and considered pursuant to a process that was like a variance—more quasi-judicial than legislative, to which the "any evidence" standard applied.<sup>30</sup> In 1998, ZPL was amended and redefined "zoning decision" to include SUPs, as follows:

[F]inal legislative action by a local government which results in:

(A) The adoption of a zoning ordinance;

(B) The adoption of an amendment to a zoning ordinance which changes the text of the zoning ordinance;

(C) The adoption of an amendment to a zoning ordinance which rezones property from one zoning classification to another;

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27. See *City Council of Augusta v. Irvin*, 109 Ga. App. 598, 600, 137 S.E.2d 82, 84 (1964).

28. *Barrett v. Hamby*, 235 Ga. 262, 265, 219 S.E.2d 399, 401 (1975).

29. See *Flowers*, 300 Ga. App. at 820, 797 S.E.2d at 848; *RCG Properties, LLC*, 260 Ga. App. at 361, 579 S.E.2d at 787; *Emory Univ. v. Levitas*, 260 Ga. 894, 896–97, 401 S.E.2d 691, 694 (1991).

This Court has never set forth the standard of review to be applied by a superior court in reviewing whether the evidence presented to a local administrative agency or local governing body supports the grant or denial of a variance. We now hold that the any-evidence standard is the appropriate standard of review.

*Emory Univ.*, 260 Ga. at 896–97.

30. *E.g.*, Ga. H.R. Bill 489, Reg. Sess., 1997 Ga. Laws 1567, § 2 (codified at O.C.G.A. tit. 36 (1997)); *e.g.*, *Dougherty Cty. v. Webb*, 256 Ga. 474, 477 n.3, 350 S.E.2d 457, 460 n.3 (1986), *overruled in part by Flowers*, 300 Ga. 820, 797 S.E.2d 846.

[W]here a [SUP] is sought under terms set out in the ordinance . . . the landowner must present his case on its facts and the law to the local governing body. That body acts in a quasi-judicial capacity to determine the facts and apply the law . . . [On appeal, the] superior court is bound by the facts presented to the local governing body. The law, of course, is determined anew by the superior court.

*Id.* (internal citations omitted).

(D) The adoption of an amendment to a zoning ordinance by a municipal local government which zones property to be annexed into the municipality; or

(E) The grant of a permit relating to a special use of property.<sup>31</sup>

In fact, the *amicus curiae* brief in *York* pointed out that the 1998 amendment to ZPL classified special exceptions as legislative, and ZPL makes it clear that approval of a SUP is a “final legislative action.”<sup>32</sup> After 1998, cases continued to treat SUP decisions as quasi-judicial.<sup>33</sup> Georgia’s appellate courts, however, did not attempt to reconcile ZPL until the decision in *York*.

In *York*, Athens College of Ministry, Inc. (ACM) applied for a SUP to build a 100 plus acre collegiate seminary. The local government approved it with conditions. Prior to the decision, neighborhood opponents (the opponents) who objected, by letter, to the approval of the SUP, appealed to superior court by writ of certiorari. In the Oconee County Superior Court, ACM and the local government objected to the opponents standing to challenge SUP approval for the first time.<sup>34</sup>

A majority of the panel held that granting the SUP was a quasi-judicial decision because the local government was required to apply criteria of approval for the SUP set out in the zoning ordinance.<sup>35</sup> Because approval of ACM’s SUP was quasi-judicial, the superior court’s review was limited to the “any evidence” standard.<sup>36</sup> Below, neither

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31. O.C.G.A. § 36-66-3(4) (2019).

32. *York*, 348 Ga. App. at 62 n.7, 821 S.E.2d at 124 n.7 (citing 1998 Ga. Laws 1391, § 1); Joseph A. All, *Local Government: Zoning Procedures: Change Definition of Zoning Decision to Include Grant of Special Use Permits*, 15 GA. ST. U. L. REV. 194, 194–95 (1998).

33. *Gwinnett Cty. v. Ehler Enters.*, 270 Ga. 570, 570, 512 S.E.2d 239, 240–41 (1999) (relying on the decision in *Emory Univ.* to apply “any evidence” to a SUP, a ZPL zoning decision); *Fulton Cty. v. Congregation of Anshei Chesed*, 275 Ga. 856, 859–60, 572 S.E.2d 530, 532 (2002) (same, relying on *Gwinnett County*); *Jackson Cty. v. Earth Resources, Inc.* 280 Ga. 389, 391, 627 S.E.2d 569, 571 (2006) (same, relying on *Fulton County*); *City of Roswell v. Fellowship Christian Sch., Inc.*, 281 Ga. 767, 768, 642 S.E.2d 824, 825 (2007) (same, relying on *Fulton County* and *Gwinnett County*); *Stendahl*, 284 Ga. at 527, 668 S.E.2d at 726 (distinguishing *City of Roswell* and *Jackson County* as involving SUPs, not rezonings); *Bulloch Cty. Bd. of Comm’rs v. Williams*, 332 Ga. App. 815, 815, 773 S.E.2d 37, 38 (2015) (applying the “any evidence” standard to a SUP and relying on *Jackson County*).

34. *York*, 348 Ga. App. at 58–59, 821 S.E.2d at 122.

35. *Id.* at 64, 821 S.E.2d at 125; see also *Flowers*, 300 Ga. at 823–24, 797 S.E.2d at 850–51.

36. *York*, 348 Ga. App. at 59–60, 821 S.E.2d at 123 (“When a party seeks certiorari review in the trial court of a decision of an administrative body acting in a quasi-judicial

ACM nor the local government challenged the opponents' standing when confronted with their letter of opposition.<sup>37</sup> Having failed to challenge the opponents' standing below, ACM and the County could not challenge the opponents' standing for the first time on appeal.<sup>38</sup> Though *York* involved a standing challenge, its rationale (if expanded) also requires substantive issues to be raised, and evidence to be presented thereon to the local government during the zoning hearing or to be precluded from consideration on appeal by the superior court.<sup>39</sup>

The majority in *York* gave no credence to the ordinance's characterization of the decision because "substance matters far more than form, and the courts need not capitulate to the label that a government body places on its action."<sup>40</sup> To determine whether a local government decision was legislative or quasi-judicial, the majority in *York* required the superior court to consider the parameters and requirements of the decision codified in the local government's zoning ordinance and the process the local governing authority used to reach it.<sup>41</sup>

The majority in *York* attempted to reconcile its decision with ZPL's classification of a SUP as a "final legislative" act.<sup>42</sup> To circumvent Section 3(4) of ZPL, the majority noted that ZPL "defines a 'zoning decision,' not a [SUP] or 'special use approval decision.'"<sup>43</sup> Therefore, ZPL's definition "does not, on its face, make a local government's issuance of any and all 'permit[s] related to a special use of property' 'legislative action[s],' regardless of the process that was used to make any such decision."<sup>44</sup> The court insisted that this was the proper textualist interpretation, irrespective of ZPL's plain text.<sup>45</sup> Under the majority's opinion in *York*, any local government decision which

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capacity, the trial court is bound by the facts and evidence presented to the administrative body . . .").

37. *Id.* at 64, 821 S.E.2d at 126.

38. *Id.*

39. *Id.*

40. *Id.* at 62 n.6, 821 S.E.2d at 124 n.6 (quoting *State of Ga. v. Int'l Keystone Knights of the Ku Klux Klan, Inc.*, 299 Ga. 392, 402, 799 S.E.2d 455, 463 (2016)).

41. *Id.* at 62, 821 S.E.2d at 124 (quoting *Flowers*, 300 Ga. at 831, 797 S.E.2d at 855).

42. *Id.* at 62–63, 821 S.E.2d at 124–25.

43. *Id.* at 62, 821 S.E.2d at 124 (quoting O.C.G.A. § 36-66-3(4)).

44. *Id.*

45. *Id.* (citing *Deal v. Coleman*, 294 Ga. 170, 172, 751 S.E.2d 337, 341 (2013)). "When we consider the meaning of a statute, 'we must presume that the General Assembly meant what it said and said what it meant.'" *Id.*



requires the application and review of criteria set forth by statute or ordinance is quasi-judicial.<sup>46</sup>

The tests presented by *Flowers* and *York* are clear: to determine whether a decision is quasi-judicial or legislative, the court must disregard nomenclature (and the clarity of ZPL) and instead analyze the ordinance's standards and procedure for the decision. In a footnote, the majority in *York* reasoned, as follows:

Although *Flowers* concerned a variance, and this case involves a [SUP], the Supreme Court in *Flowers* noted that they are similar. The Supreme Court then stated, "it is not clear that [SUPs] are meaningfully different from variances cases . . . at least in cases where the zoning board must apply a set of factors set out in the zoning ordinance to the specific facts of the [SUP application]." . . . [S]ince the decision-making process in *Flowers* is similar to the process used here [for an SUP], we find that *Flowers* is applicable.<sup>47</sup>

This reasoning may be sound in the context of a variance (which is not a "zoning decision" under ZPL and was at issue in *Flowers*) and non-zoning contexts such as licensing.<sup>48</sup> But, it creates inherent conflict when applied to other "zoning decisions" identified as legislative acts under ZPL.

Judge Goss's dissent in *York* distinguishes *Flowers* based on a textual interpretation of the ZPL, noting a distinction between a SUP that involves the change in use of land to "a change 'potentially incompatible with uses allowed in the particular zoning district'" and a SUP that does not involve the change in use of the real estate at issue<sup>49</sup>—a distinction previously made by Judge Branch in *Druid Hills Civic Association v. Buckler*,<sup>50</sup> which relies on *RCG Properties, LLC v. City of Atlanta Board of Zoning Adjustments*.<sup>51</sup> The majority dismissed this distinction because "*Buckler* neither held nor implied that all [SUP] decisions are legislative, and [the court] will not read it as such."<sup>52</sup> But,

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46. *Id.* at 63, 821 S.E.2d at 125.

47. *Id.* at 61 n.5, 821 S.E.2d at 124 n.5 (internal citation omitted).

48. *See* *Rogers v. City of Atlanta*, 110 Ga. App. 114, 121–22, 137 S.E.2d 668, 674 (1964) (cited by the majority in *York*) ("A governmental agency entrusted with the licensing power . . . functions as a legislature when it prescribes standards, but the same agency acts as a judicial body when it makes a determination that a specific applicant has or has not satisfied them.")

49. *York*, 348 Ga. App. at 64, 821 S.E.2d at 126 (quoting *Druid Hills Civic Ass'n v. Buckler*, 328 Ga. App. 485, 493, 760 S.E.2d 194, 201 (2014)) (Goss, J., dissenting).

50. 328 Ga. App. 485, 760 S.E.2d 194.

51. 260 Ga. App. 355, 579 S.E.2d 782 (2003).

52. *York*, 348 Ga. App. at 63 n.9, 821 S.E.2d at 125 n.9.

the majority and dissent in *York* failed to recognize that *Druid Hills Civic Association* and *RCG Properties, LLC* involved re-platting residential lots on a development plat and a request for a “special administrative permit,” respectively—neither of which has ever been a zoning decision under ZPL.<sup>53</sup> Neither case adequately deals with the conflict between ZPL and the majority opinion in *York*.

Looking forward, the next step in the transformation of zoning decisions to quasi-judicial decisions will involve a challenge to denial or approval of a rezoning application. The majority’s holding in *York* is unworkable when applied to rezoning applications and the practical reality of how zoning hearings are conducted. Although rezoning decisions are unequivocally legislative “zoning decisions” under ZPL, they require consideration of factors set forth in an ordinance. In fact, ZPL requires that a local government’s zoning ordinance include, “standards governing the exercise of the [constitutionally delegated legislative] zoning power [which] . . . may include any factors . . . the local government finds relevant in balancing the interest in promoting the public health, safety, morality, or general welfare against the right to the unrestricted use of property.”<sup>54</sup> Likewise, in *Guhl v. Holcomb Bridge Road Corp.*,<sup>55</sup> the supreme court established the following factors courts must consider to determine whether the current zoning district applied to property is constitutional:

- “(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

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53. *Druid Hills Civic Ass’n*, 328 Ga. App. at 485–86, 760 S.E.2d at 196; *RCG Props., LLC*, 260 Ga. App. at 355, 579 S.E.2d at 783.

54. O.C.G.A. § 36-66-5(b) (2019). ZPL also requires that local governments “adopt policies and procedures which govern calling and conducting hearings required by [ZPL Section 4].” O.C.G.A. § 36-66-5(a) (2019).

55. 238 Ga. 322, 232 S.E.2d 830 (1977).

(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.”<sup>56</sup>

*Guhl*'s requirements are established precedent. Analysis of a rezoning application under the *Guhl* factors (and its progeny) is required when a local government's decision on a rezoning application is appealed to superior court.<sup>57</sup>

Therefore, every zoning decision involving a rezoning of property requires analysis of the rezoning request pursuant to criteria established legislatively by a zoning ordinance (as required by statute) and *Guhl*. This analysis determines whether a local government acted in a constitutional manner in either approving or denying rezoning. Application of these authorities affords property owners the assurance that a local government cannot act arbitrarily in applying a zoning classification to their property. Yet, the majority opinion in *York* will transform legislative rezoning decisions into quasi-judicial acts. If a rezoning decision on a particular tract is deemed quasi-judicial, *Flowers* and *York* will rewrite the list of “zoning decisions” defined by ZPL, leaving the adoption of a zoning ordinance as the only legislative decision.

As a practical matter, the transformation of legislative zoning hearings into quasi-judicial proceedings is neither workable nor fair to the applicant and the public. ZPL aside, the decisions in *Flowers* and *York* represent successive (and logical) steps if the goal is to transform informal, legislative style hearings on zoning decisions into more formal, administrative proceedings and give superior courts the responsibilities of appellate courts. But zoning hearings do not fit well into a formal, administrative hearing model.

After the decision in *York*, zoning practitioners, local governments, zoning applicants, and zoning opponents must prepare and preserve a legal, evidentiary record below, even if the likelihood of appeal is remote. Preservation of the record before the local government may require hearing transcription by a court reporter,<sup>58</sup> proffering,

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56. *Id.* at 323–24, 232 S.E.2d at 831–32 (quoting *La Salle Nat'l Bank v. Cty. of Cook*, 208 N.E.2d 430, 436 (Ill. App. Ct. 1965)).

57. *E.g., Diversified Holdings, LLP*, 302 Ga. at 608–09, 612, 807 S.E.2d at 887, 889.

58. Despite the existence of a transcript of the hearing, the minutes of the local governing body remain the official record of its actions. O.C.G.A. § 50-14-1(a)(1)(B), (e)(2)(b) (2019); *see also* O.C.G.A. § 36-1-25 (2019); *Garner v. Young*, 214 Ga. 109, 111, 103 S.E.2d 302, 304 (1958) (“[T]he highest and best evidence of official action taken by [a local government is] . . . the original minutes or exemplified copies of the action taken by it.”). *Id.*

swearing, and examining expert witnesses, and pre-filing written objections. Time limitations imposed by the local government may impair the ability of both applicants and opponents to present their cases in a manner capable of preserving a solid record. ZPL only requires a local government give ten minutes per side at a zoning hearing.<sup>59</sup> Time limits can be onerous on the ability of applicants and opponents to present or oppose a zoning case, especially if either the local government's planning staff or recommending body do not make recommendations favorable to an applicant's or opponent's position.

Therefore, written or verbal objections must be made by (1) a local government to challenge deficiencies in the presentation of the rezoning applicant or the opponents thereof sufficient to give a "reasonable mind" evidence to justify the decision under the "any evidence" standard, (2) the applicant to support approval, negate public objection and, as applicable, support or refute staff and/or the recommending body, and (3) public opponents to justify denial or mitigating conditions. Otherwise, those objections are deemed waived under the "any evidence" rule on appeal to the superior court.

At a minimum, written objections of an applicant should include objections to the following: any time limitation for presentation and argument imposed on the applicant, the standing of public opponents and the lay, testimony and evidence presented by them, any evidence or testimony presented, or decision made upon grounds other than the local ordinance standards required by O.C.G.A. § 36-66-5, any decision that does not follow the recommendations of the local government's planning staff or recommending body to the extent favorable, and (as a catch all) grounds for reversal similar to those set out in O.C.G.A. § 50-13-19(h)<sup>60</sup> for decision of administrative agencies.

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59. O.C.G.A. § 36-66-5(a) (2019).

60. O.C.G.A. § 50-13-19(h) (2019) provides as follows:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

*Id.*

Applicants and opponents to rezoning applications usually appear *pro se* at zoning hearings, which are usually conducted without the procedural and evidentiary formalities required of most quasi-judicial proceedings. As a result, the parties are not aware of the risks presented by the proceedings' quasi-judicial designation. Zoning hearings that must follow an administrative hearing format will require (if done properly) much more time and significant, costly preparation, giving lawyers the opportunity for a new revenue source.

By its own terms, the majority opinion in *York* is only physical precedent.<sup>61</sup> However, it may be followed by a future case that challenges a rezoning decision, as the next step in the transition of legislative zoning decisions into quasi-judicial actions. Whatever is done, the courts “must presume that the General Assembly meant what it said and said what it meant.”<sup>62</sup>

*C. A Public Hearing Before a Recommending Body May Satisfy ZPL's Public Hearing Requirement.*

In *Hoechstetter v. Pickens County*,<sup>63</sup> a unanimous supreme court indicated that an “adequate” record of a hearing before a recommending body—such as a planning commission—“perhaps might satisfy the [hearing] requirements of ZPL.”<sup>64</sup> In *Hoechstetter*, property owners sought a SUP from the local governing authority. The planning commission held a hearing at which multiple neighbors spoke against the SUP. Regardless, the application received an approval recommendation.<sup>65</sup>

A month later, Pickens County's director of public relations prepared a one-page memorandum conveying the recommendation, stating that the planning commission heard “testimony from the applicant and considerable objections from the surrounding neighborhood in attendance,” but it did not state the opponents' substantive objections.<sup>66</sup> The County's board of commissioners approved the SUP based on the approval recommendation, without conducting another hearing pursuant to O.C.G.A. § 36-66-4. The neighborhood opponents appealed,

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61. *York*, 348 Ga. App. at 64, 821 S.E.2d at 126.

62. *Deal*, 294 Ga. at 172, 751 S.E.2d at 341 (quoting *Arby's Rest. Grp., Inc. v. McRae*, 292 Ga. 243, 245, 734 S.E.2d 55, 57 (2012)).

63. 303 Ga. 786, 815 S.E.2d 50 (2018).

64. *Id.* at 788, 815 S.E.2d at 52.

65. *Id.* at 787, 815 S.E.2d at 51.

66. *Id.* at 788, 815 S.E.2d at 52.

alleging insufficient opportunity to be heard by the governing authority.<sup>67</sup>

The supreme court agreed, finding the record, if any, transmitted to the governing authority did not satisfy ZPL.<sup>68</sup> The court noted that an adequate record need not be a “contemporaneous and verbatim transcript of the hearing” before the recommending body, but it must be more “fulsome than the one in” *Hoechstetter*.<sup>69</sup> Since the board of commissioners of the county, as the local governing authority, exercises zoning authority,<sup>70</sup> ZPL’s hearing requirement was presumed by practitioners to apply to the board of commissioners. Local governments cannot delegate their zoning power.<sup>71</sup> There is no legal requirement that any local government create a recommending body. Many do so to flesh out information on the development proposed in an application in advance of the hearing before the governing authority. Plainly, the prevailing (and best) practice is to hold a public hearing before both the recommending body as well as the governing authority.

Reading *York* and *Hoechstetter* together causes concern. On one hand, the majority in *York* continues the transition of zoning hearings into quasi-judicial administrative proceedings that are more detailed than those currently conducted by most jurisdictions. On the other hand, *Hoechstetter* can be read to allow the governing body of the local government to defer the hearing required by ZPL to a recommending body before which (presumably) the required legal and evidentiary record for a quasi-judicial hearing would be presented. Does *Hoechstetter*, however, suggest that the governing body can delegate the obligation to conduct a quasi-judicial hearing to a recommending body, as a surrogate? If so, the legal and evidentiary requirements for a quasi-judicial hearing must be satisfied before the surrogate body.

*D. Evidentiary Sufficiency of Public Opposition: Macon-Bibb County Planning & Zoning Comm’n v. Epic Midstream, LLC*

Generally, public opposition is insufficient to defeat a rezoning or SUP application if the opponents assert only generalized fears about traffic, noise, or other development impacts.<sup>72</sup> Public grandstanding about speculative impacts resulting from a proposed development

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67. *Id.*

68. *Id.*

69. *Id.* at 788 n.3, 815 S.E.2d at 52 n.3.

70. GA. CONST. art. IX, § 2, para. 4.

71. *Humthlett v. Reeves*, 212 Ga. 8, 12–13, 90 S.E.2d 14, 18 (1955).

72. *E.g.*, *Fulton Cty. v. Bartenfield*, 257 Ga. 766, 770–71, 363 S.E.2d 555, 559–60 (1988).

should be given little credibility. However, the majority of a division of the court of appeals in *Macon-Bibb County Planning & Zoning Commission v. Epic Midstream, LLC*,<sup>73</sup> found that public opposition to a SUP was sufficient to support its denial because the opponents' statements addressed "specific" issues, though the statements were not factually substantiated.<sup>74</sup>

In *Macon-Bibb County*, Epic Midstream, LLC (Epic) acquired property (the subject property) on which a previous owner operated a rail-to-pipeline jet-fuel transfer station in conjunction with a jet-fuel pipeline and easement therefor.<sup>75</sup> The pipeline leaked prior to Epic's acquisition, and even after transfer to Epic, the prior owner "retained responsibility for the jet-fuel leak and its remediation."<sup>76</sup>

After acquiring the subject property, Epic filed a rezoning application to rezone a portion of the property to M-1, Wholesale and Light Industrial District (consistent with the zoning applied to the rest of the subject property) and a SUP application "to build and operate a railroad spur transfer station for the offloading of ethanol from railroad tanker cars directly into an underground pipeline [planned to be constructed in the existing pipeline right of way] which would transport the ethanol to Epic's petroleum distribution facility nearby."<sup>77</sup> Epic's operation was similar to that of the prior owner, though an entirely different fuel was transported. Epic's SUP application did not seek approval for the ethanol pipeline, which was already approved by the Georgia Department of Transportation and the Macon-Bibb Engineering Department.<sup>78</sup> "Thus, regardless of whether the [Macon-Bibb Planning & Zoning Commission (the PZ Commission)] approved or denied the [SUP], Epic could build the . . . pipeline . . ."<sup>79</sup>

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73. 349 Ga. App. 568, 826 S.E.2d 403 (2019) (hereinafter *Macon-Bibb Cty.*).

74. *Id.* at 575–76, 826 S.E.2d at 409.

75. *Id.* at 568–70, 826 S.E.2d at 404–05.

76. *Id.* at 570, 826 S.E.2d at 406.

77. *Id.* at 569, 826 S.E.2d at 405; MACON-BIBB COUNTY, GA., COMPREHENSIVE LAND DEV. RESOLUTION, ch. 16 (1997) [hereinafter CLDR].

78. *Macon-Bibb Cty.*, 349 Ga. App. at 569 n.2, 826 S.E.2d at 405 n.2.

79. *Id.* at 576, 826 S.E.2d at 409 (Brown, J., dissenting). Although the opinion is not clear, a review of the Macon-Bibb County Comprehensive Land Development Resolution (the CLDR) suggests that Epic Midstream sought a SUP for either or both a railroad terminal and an "establishment for the manufacture, repair, assembly, or processing of materials similar in nature to those listed in Section 16.03 [of the CLDR] which is not objectionable by reason of smoke, dust, odor, bright lights, noise or vibration." CDLR § 16.03(4), (18).

Both applications dovetailed for hearing before the PZ Commission.<sup>80</sup> Epic proffered significant expert and design testimony in support of the applications. Its design manager testified as to the site layout. Its project director testified as to the limited frequency—roughly once a month—of the fuel transfers. Its expert land planner testified that the rezoning and SUP applications sought development consistent with most nearby properties currently zoned and used for industrial operations.<sup>81</sup> Additionally, “the land planner testified [in conclusion] that the region in which the property is located is ‘largely industrial,’ that the property is within close proximity to five industrial parks, and that the property is best suited to an industrial purpose.”<sup>82</sup> Since 1991, no new residences were constructed in a small residential development located between the northern boundary of the subject property and an industrial park.<sup>83</sup>

Four opponents objected to Epic’s applications based on the leak of the jet-fuel pipeline under prior ownership.<sup>84</sup> The opponents, which included a member of the Board of Commissioners (the Commissioner) whose district included the subject property, opposed the applications, stating that the residents “were suffering ‘environmental injustice’ and still had no answers about the past jet-fuel pipeline leak.”<sup>85</sup> The PZ Commission approved the rezoning and denied the SUP application.<sup>86</sup> Epic filed a motion to rehear the SUP application along with a revised site plan that moved the transfer facility further from the residential neighborhood, and “included additional engineering and safety controls, such as an earthen berm, . . . additional fire hydrants[,] and a security fence.”<sup>87</sup> Epic also met with the Commissioner.<sup>88</sup>

Roughly a month before the hearing, the Pipeline Hazardous Materials Safety Administration (PHMSA) and the Federal Railway Administration designated ethanol as a “hazardous liquid” which “may pose an unreasonable risk to life or property when transported by a

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80. In *Macon-Bibb County*, the zoning authority rests with the PZ Commission by virtue of a rare, local constitutional amendment carried forward by the 1983 Constitution. 1947 Ga. Laws 1240, § 1; 1986 Ga. Laws 5308; *see also* GA. CONST. art. XI, § 1, para. 4.

81. *Macon-Bibb Cty.*, 349 Ga. App. at 569–70, 826 S.E.2d at 405.

82. *Id.* at 570, 826 S.E.2d at 405.

83. *Id.*

84. *Id.* at 570, 826 S.E.2d at 406.

85. *Id.*

86. *Id.* at 570–71, 826 S.E.2d at 406.

87. *Id.* at 571, 826 S.E.2d at 406.

88. *Id.*



hazardous liquid pipeline facility in a liquid state.”<sup>89</sup> With ethanol’s designation as a hazardous liquid, the Commission’s Planning Staff (Staff) revised its report on the applications to state that “hazardous and flammable liquid . . . could pose a danger to the adjacent residents in the event of a derailment, spill, or fire.”<sup>90</sup> The staff concluded that the proposed transfer station would “pose significant negative impacts to the adjoining and nearby properties.”<sup>91</sup> However, the staff recommended approval with mitigating conditions.<sup>92</sup>

When its request for rehearing was considered, Epic introduced additional evidence of its intent to relocate facilities and enhanced procedures and safety controls to address the Commissioner’s objections and the staff’s concerns about ethanol’s hazardous designation. However, Epic could not guarantee the railcars used to transport ethanol would comply with the new PHMSA hazardous liquid regulations or that transfer would not happen at night. Epic also apparently did not confirm the prior owners’ responsibility for the previous spill or document prior actions of remediation thereafter.<sup>93</sup>

The Commissioner testified again that:

The [neighborhood opponents’] major concern and the reason we don’t want [the PZ Commission] to approve anything else is we are not sure of what’s out there, what’s in the ground. We are not sure the level of contamination. We are not sure whether any remediation has been done . . . .<sup>94</sup>

The Commissioner asked that the rehearing be deferred or denied until the neighborhood received answers on its concerns.<sup>95</sup>

Residents also expressed their opposition. The Commission received a petition signed by “nearly 100 area residents” opposing the rezoning application which “raised concerns about the flammable nature of the ethanol,” devaluation of property due to the pipeline, “traffic and noise issues, . . . the hazardous nature of ethanol, and concerns regarding the potential for spills during the unloading process.”<sup>96</sup> But, they did not

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89. *Id.* at 569 n.3, 574–75, 826 S.E.2d at 406 n.3, 408 (quoting 49 U.S.C. § 60101(a)(4)(B) (2019)) (emphasis omitted).

90. *Id.* at 575, 826 S.E.2d at 408.

91. *Id.*

92. *Id.* at 580, 826 S.E.2d at 411–12 (Brown, J., dissenting).

93. *Id.* at 571, 577, 826 S.E.2d at 406, 410 (majority opinion).

94. *Id.* at 571, 826 S.E.2d at 406.

95. *Id.*

96. *Id.* at 574, 826 S.E.2d at 408.

counter Epic's expert analysis, except through lay, anecdotal comments.<sup>97</sup>

The Commission denied Epic's motion for rehearing, citing ethanol's status as a hazardous liquid.<sup>98</sup> Epic appealed, and the superior court reversed finding that the PZ Commission abused its discretion.<sup>99</sup> The PZ Commission appealed to the court of appeals.<sup>100</sup>

On appeal, the key issue was whether the opposing comments of the Commissioner and individual opponents, along with the petition, which raised concerns about ethanol safety, were sufficient to justify the PZ Commission's denial, particularly when compared to the expert analysis presented by Epic and Staff's recommendation of approval.<sup>101</sup> The majority of the court of appeals held that they were, finding the fears expressed by the opponents were "specific" to the subject property and Epic's proposed use and raised "specific issues . . . about noise, traffic, possible contamination, and the flammability and hazardous nature of ethanol that were specific to this tract and conditional use application."<sup>102</sup>

The majority held that the opponents' comments did not express generalized fears as did opponents in *Fulton County v. Bartenfeld*<sup>103</sup> to a SUP for a landfill.<sup>104</sup> There, opponents' comments about diminishing property values and "traffic problems" were insufficient to support denial of the SUP because they constituted generalized concerns "not specifically shown to exist under the facts of th[e] case."<sup>105</sup> Stating only general concerns, the opponents in *Bartenfeld* were unable to stop the landfill.<sup>106</sup>

The majority opinion likened the opponents' concerns to the "specific concerns" raised in *Jackson County v. Earth Resources, Inc.*<sup>107</sup> There, the proposed landfill was inconsistent with the county's comprehensive plan, a real estate appraiser testified as to the negative effect on nearby property values and the applicant's "representations concerning the

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97. *Id.*

98. *Id.* at 571, 826 S.E.2d at 406.

99. *Id.* at 571–72, 826 S.E.2d at 406–07.

100. *Id.* at 572, 826 S.E.2d at 407.

101. *Id.* at 572–73, 826 S.E.2d at 407.

102. *Id.* at 575–76, 826 S.E.2d at 409.

103. 257 Ga. 766, 363 S.E.2d 555.

104. *Bartenfeld*, 257 Ga. at 767, 363 S.E.2d at 557; *Macon-Bibb Cty.*, 349 Ga. at 575–76, 826 S.E.2d at 409.

105. *Bartenfeld*, 257 Ga. at 770–71, 363 S.E.2d at 559.

106. *Id.* at 770–71, 363 S.E.2d at 559–60.

107. 280 Ga. 389, 627 S.E.2d 569 (2006).

potential for groundwater contamination were rebutted.”<sup>108</sup> This specific factual evidence was sufficient to support denial.<sup>109</sup> The majority in *Macon-Bibb County* cited *Bartenfeld* for the proposition that more than expert opinion can “be presented to, and considered by” the governing authority, and it admonished the superior court to not reweigh evidence before the governing authority.<sup>110</sup> The majority, applying the “any evidence” standard to review quasi-judicial zoning decisions, found the opponents’ evidence sufficient to support denial of Epic’s applications, noting that neither the trial nor appellate court should reweigh the “credibility of determinations of the factfinder.”<sup>111</sup> However, the majority did not determine whether the opponents’ “specific” concerns were factually substantiated.<sup>112</sup>

Denial of a rezoning or SUP application solely based on public lay, anecdotal comments and concerns is problematic. In *Macon-Bibb County*, only three residents and a local politician spoke in opposition at the first hearing.<sup>113</sup> At some point, denial of rezoning based on an evidentiary record, in which authoritative expert testimony is countered with only lay, anecdotal comments will render the denial arbitrary and capricious.

As Judge Brown stated in his dissent, “[t]o accept the majority’s interpretation of ‘any evidence’ is to accept any modicum of speculative fear or unsubstantiated and misplaced blame as reasonable cause to deny an appropriate use of private property.”<sup>114</sup> He noted that:

Following the majority’s line of reasoning leads to the conclusion that specific, unsubstantiated fears somehow hold more weight than general, unsubstantiated fears . . . . [Under *Bartenfeld*,] [r]egardless of how narrowly the fear or issue is framed, if it still is ‘not

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108. *Id.* at 391, 627 S.E.2d at 572.

109. *Id.*

110. *Macon-Bibb Cty.*, 349 Ga. App. at 576, 826 S.E.2d at 409 (quoting *Earth Resources*, 280 Ga. at 391, 627 S.E.2d at 571).

111. *Id.* at 572–73, 826 S.E.2d at 407 (quoting *DeKalb Cty. v. Bull*, 295 Ga. App. 551, 552, 672 S.E.2d 500, 501 (2009)). The *Macon-Bibb County* opinion does not attempt to reconcile ZPL and the quasi-judicial “any evidence” standard, implicitly relying on the majority in *York*.

112. The opponents in *Earth Resources* opposed a SUP for a landfill based on fears regarding “truck traffic and other issues,” concerns similar in form and substance to those in *Bartenfeld*. *Earth Resources*, 280 Ga. at 391, 627 S.E.2d at 571–72.

113. *Macon-Bibb Cty.*, 349 Ga. App. at 570, 826 S.E.2d at 406.

114. *Id.* at 576, 826 S.E.2d at 409 (Brown, J., dissenting).

specifically shown to exist under the *facts* of the case,' it does not rise to the level of any evidence.<sup>115</sup>

In other words, Judge Brown reasoned that a superior court under the “any evidence” standard can determine whether there was sufficient evidence such that “a reasonable mind might accept as adequate to support said decision” without reweighing the credibility of evidence.<sup>116</sup> Unsubstantiated fears should be inadequate to a reasonable mind to support a quasi-judicial decision. Judge Brown also criticized the majority’s failure to note the substantive evidence supporting approval of the SUP.<sup>117</sup> Because of Judge Brown’s dissent, *Macon-Bibb County* is also physical precedent only.

The relationship between the *York* and *Macon-Bibb County* opinions causes similar concerns expressed about *Hoechstetter*. As noted, *York* continued the transition of legislative local government zoning decisions into quasi-judicial proceedings, subject to review by writ of certiorari under the “any evidence” rule. The “any evidence” standard places a greater burden on zoning applicants and opponents to develop an evidentiary record sufficient to support the zoning decision. However, the same court in *Macon-Bibb County* allowed neighborhood opponents to defeat a SUP with nominally “specific” anecdotal and lay “comments” that asserted concerns about the proposed development on a specific property to support denial without factual substantiation.<sup>118</sup>

Zoning ordinances (as required by ZPL) establish procedures and standards to afford due process protections to the public in the local governments’ regulation of property uses through the exercise of their zoning power.<sup>119</sup> However, with respect to property owners, “due process guarantees [also] act as a check against the arbitrary and capricious use of that police power,”<sup>120</sup> and “[s]pecific, unsubstantiated fears” provide an insufficient basis to deprive a property owner a desired, constitutional use of their property.<sup>121</sup> It is inconsistent for the court of appeals in *York* to hold that a SUP is a quasi-judicial decision of the local government because its resolution requires the application of criteria to the determination of approval (subject to superior court

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115. *Id.* at 578, 826 S.E.2d at 410 (Brown, J., dissenting) (quoting *Bartenfeld*, 257 Ga. at 771, 363 S.E.2d at 559) (emphasis omitted).

116. *Id.* at 576–77, 826 S.E.2d at 409 (Brown, J., dissenting) (quoting *Emory Univ.*, 260 Ga. at 897, 401 S.E.2d at 694).

117. *Id.* at 577, 826 S.E.2d at 409 (Brown, J., dissenting).

118. *Id.* at 570, 826 S.E.2d at 406 (majority opinion).

119. O.C.G.A. § 36-66-2 (2019).

120. *Diversified Holdings, LLP*, 302 Ga. at 611, 807 S.E.2d at 888.

121. *Macon-Bibb Cty.*, 349 Ga. App. at 578, 826 S.E.2d at 410 (Brown, J., dissenting).

review under an “any evidence” standard) and then in *Macon-Bibb County* allow anecdotal and unsupported statements of concerns to satisfy the “any evidence” standard of review and deny the property owner their constitutional right to use their property.

*E. Deference to the Zoning Administrator: Clayton County v. New Image Towing & Recovery, Inc.*

In yet another physical precedent only case, the court of appeals in *Clayton County v. New Image Towing & Recovery Inc.*<sup>122</sup> held that a zoning administrator did not abuse her discretion when she required a business license applicant to submit a site plan as part of an application, even though the business license provisions of the County’s general code did not require it.<sup>123</sup> Similarly, the court held that the Clayton County Board of Zoning Appeals (BZA) did not abuse its discretion in affirming the administrator’s decision.<sup>124</sup>

In *Clayton County*, New Image Towing and Recovery, Inc. (New Image) applied for a business license for a towing and wrecker service, a permitted use in the zoning district applicable to the subject property. New Image did not change the physical characteristics of the premises, only the use thereon. As part of its business license application process, New Image met with a review committee (the committee) which requested the submission of a site plan to facilitate review of the application. The county code pertinent to business licenses did not require the submission of a site plan as a condition of approval of a business license.<sup>125</sup>

New Image refused to provide a site plan and requested a written decision from the zoning administrator that the site plan was required for its business license—which the zoning administrator provided. New

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122. 830 S.E.2d 805, No. A19A0298, 2019 Ga. App. LEXIS 438 (Ga. Ct. App. July 2, 2019).

123. *Id.* at 811, 2019 Ga. App. LEXIS 438 at \*14.

124. *Id.*

125. *Id.* at 807, 2019 Ga. App. LEXIS 438 at \*1–2. Business licenses and zoning are generally considered separate legal responsibilities. *Cobb Cty. v. Peavy*, 248 Ga. 870, 872, 286 S.E.2d 732, 734 (1982):

[A] business license is typically not a device to ensure compliance with [the] zoning ordinances. Although the general aim of both zoning and licensing regulations is the promotion of the general welfare, each is independent of the other and seeks to accomplish its purpose by a different means. The fact that a zoning ordinance permits a use in a particular district does not authorize the use there without a license.

*Id.*

Image appealed the zoning administrator's decision to BZA, which conducted a hearing thereon.<sup>126</sup>

At the BZA hearing, the zoning administrator asserted that a site plan is required "so that the [review committee] can make informed zoning decisions and consider potential environmental and safety impacts of the proposed use" and to enable her department to determine whether a proposed use is permitted under the zoning ordinance.<sup>127</sup> BZA upheld the zoning administrator's decision to require a site plan as a condition precedent to the issuance of a business license to New Image.<sup>128</sup> New Image appealed by writ of certiorari to the superior court. The superior court reversed BZA's decision, and Clayton County appealed.<sup>129</sup>

Here again, a majority of the court of appeals overturned the superior court.<sup>130</sup> The majority purported to apply a *de novo* standard of review, as required when interpreting questions of law in a certiorari proceeding.<sup>131</sup> But, implicit in the majority opinion is deference to the zoning administrator's interpretation of the zoning ordinance and her authority thereunder. Writing for the majority, Judge Markle justified the zoning administrator's demand for a site plan based on Section 6.1 of the *Zoning Ordinance* (not the business license code), which states that "[a]ll . . . land use changes . . . shall be subject to all Development Standards and regulations for the applicable zoning district," and Section 6.2 that requires a property owner to comply with the ordinance's development standards, including parking standards, if a "structure, parking area or other site feature . . . [is] enlarged, altered, or expanded."<sup>132</sup> The court determined that the term "altered" included alterations in the use of a property.<sup>133</sup> The majority reasoned that this interpretation was consistent with the zoning ordinance parking standards, which varied depending on the intensity of a use.<sup>134</sup> Applying the "any evidence" standard, there was evidence that New Image's proposed use varied from the prior lessee's use.<sup>135</sup>

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126. *Clayton Cty.*, 830 S.E.2d at 807–08, 2019 Ga. App. LEXIS 438 at \*2–3.

127. *Id.* at 810–11, 2019 Ga. App. LEXIS 438 at \*12.

128. *Id.* at 808, 2019 Ga. App. LEXIS 438 at \*4.

129. *Id.*

130. *Id.* at 811, 2019 Ga. App. LEXIS 438 at \*14.

131. *Id.* at 808, 2019 Ga. App. LEXIS 438 at \*6.

132. *Id.* at 809–10, 2019 Ga. App. LEXIS 438 at \*8–9 (quoting CLAYTON COUNTY, GA., ZONING ORDINANCE §§ 6.1–6.2).

133. *Id.* at 810, 2019 Ga. App. LEXIS 438 at \*9–10.

134. *Id.* at 810, 2019 Ga. App. LEXIS 438 at \*10.

135. *Id.* at 810, 2019 Ga. App. LEXIS 438 at \*10–11. Prior uses on the property included a fencing company. *Id.*

After finding textual justification for the zoning administrator's assertion that New Image must comply with the zoning ordinance's parking standards, the majority turned to the site plan requirement.<sup>136</sup> In the greatest show of deference, the court stated (in a footnote) that the zoning "[a]dministrator adequately justified her rationale for requiring a site plan under these circumstances throughout the hearing."<sup>137</sup> The majority purportedly applied rules of statutory construction to read the term "altered" in Section 6.2 *in pari materia* with other sections of the zoning ordinance which explicitly required submission of a site plan.<sup>138</sup> Since the court accepted the zoning administrator's justification for requiring a site plan, she "did not abuse her discretion in requiring [the business] to submit a site plan during the business license application process, nor did the BZA abuse its discretion in upholding that decision."<sup>139</sup>

New Image argued that *Arras v. Herrin*<sup>140</sup> controlled. In *Arras*, the petitioner sought a writ of mandamus to compel the issuance of an alcohol license after the local governing authority denied the petitioners application.<sup>141</sup> While the petitioner satisfied all the objective factors under the ordinance for issuance of a license, the application was denied because the ordinance granted the governing authority "full and sole authority, in its absolute discretion, to determine whether [to grant the] license . . ."<sup>142</sup> The supreme court held that the governing authority could not deny the license "by exercising the 'absolute discretion' contained in" the ordinance.<sup>143</sup> To do so violated due process.<sup>144</sup> Instead, the governing authority was required to employ "ascertainable standards . . . by which an applicant can intelligently seek to qualify for a license."<sup>145</sup>

The majority in *Clayton County* distinguished *Arras* based on the "posture" of the license applications because the petitioner's license in *Arras* was actually denied, whereas New Image's business license application was not.<sup>146</sup> Also, the majority stated that "the development

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136. *Id.* at 810, 2019 Ga. App. LEXIS 438 at \*11.

137. *Id.* at 811 n.3, 2019 Ga. App. LEXIS 438 at \*14 n.3.

138. *Id.* at 809–10, 2019 Ga. App. LEXIS 438 at \*8–9.

139. *Id.* at 811, 2019 Ga. App. LEXIS 438 at \*14.

140. 255 Ga. 11, 334 S.E.2d 677 (1985).

141. *Arras*, 255 Ga. at 11, 334 S.E.2d at 678.

142. *Id.* at 11–12, 334 S.E.2d at 678.

143. *Id.* (quoting Section 11-102(7) of the Camden County beer, wine and liquor ordinance).

144. *Id.* at 12, 334 S.E.2d at 679.

145. *Id.* (quoting *Hornsby v. Allen*, 326 F.2d 605, 612 (5th Cir. 1964)).

146. *Clayton Cty.*, 830 S.E.2d at 811, 2019 Ga. App. LEXIS 438 at \*13.

standards that guide the business license application process are set forth in Article 6, and those include the submission of site plans.”<sup>147</sup> However, Article 6 of the Clayton County Zoning Ordinance applied to construction “Development Standards” while business license regulations were part of Clayton County’s general Code of Ordinances and not in the Zoning Ordinance appendix.<sup>148</sup>

Judge Coomer’s dissent pointed out the majority’s result-driven opinion, stating: the majority “impermissibly expand[ed] the [meaning] of the ordinance beyond its explicit terms,” violating canons of statutory construction that demand that a plain and unambiguous ordinance be interpreted according to its terms and any ambiguities be resolved in favor of the free use of property.<sup>149</sup> He noted that the majority opinion implicitly interprets the term “other site feature” used in Section 6.2 of the Zoning Ordinance to mean “land use change” in Section 6.1—an impermissible expansion of the text.<sup>150</sup> Section 6.1 titled “Introduction” did not define the terms or modify Section 6.2 titled “Expansion or Modification of Existing Uses and Structures.”<sup>151</sup> Section 6.1 was simply a jurisdictional statement preceding the Zoning Ordinance that did not apply to business licenses, and Section 6.2 simply set the rule that if existing “structures, parking area[s] or other [physical] site feature[s]” are “enlarged, altered, or expanded,” then they must conform to the requirements of the Article, similar to any nonconforming structure.<sup>152</sup> Because New Image did not “enlarge[], alter[], or expand” any improvement on the property, it was not required to comply with the Zoning Ordinance provision governing parking standards.<sup>153</sup>

Judge Coomer also found no textual justification for the zoning administrator’s site plan requirement, noting that the text of the Zoning Ordinance plainly provided for “specific, unambiguous requirements for when site plans must be provided” none of which applied to a “request for a business license.”<sup>154</sup> Further, he found Clayton County’s refusal to act on New Image’s business license application tantamount to its denial. “Because New Image has complied with all necessary [textual] requirements for obtaining a business license and is not required to

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147. *Id.*

148. CLAYTON COUNTY, GA., CODE OF ORDINANCES, ch. 22, art. II; App. A, art. 6 (the Zoning Ordinance).

149. *Clayton Cty.*, 830 S.E.2d at 812, 2019 Ga. App. LEXIS 438 at \*17 (Coomer, J., dissenting).

150. *Id.* (Coomer, J., dissenting).

151. *Id.* at 812–13, 2019 Ga. App. LEXIS 438 at \*17–19 (Coomer, J., dissenting).

152. *Id.* at 812–13, 2019 Ga. App. LEXIS 438 at \*16, \*18–19 (Coomer, J., dissenting).

153. *See id.* at 812–13, 2019 Ga. App. LEXIS 438 at \*16, \*20 (Coomer, J., dissenting).

154. *Id.* at 813 n.1, 2019 Ga. App. LEXIS 438 at \*20 n.1 (Coomer, J., dissenting).



submit a site plan in this instance, the county must issue the business license applied for.”<sup>155</sup>

*Clayton County* is a highwater mark for judicial deference to decisions of zoning administrators, boards and local governments, as if they are the equivalent of administrative agencies. The court accepted the zoning administrator’s “explan[ation] that a site plan was necessary to determine whether New Image’s proposed use was in compliance with” the zoning ordinance and found that “explanation [to be] entirely reasonable.”<sup>156</sup> This is the same test in Georgia for deference to a state administrative agency’s interpretation of its own regulations which asks whether the interpretation “is plainly erroneous or inconsistent’ with the regulation . . . [meaning that a court must uphold] an agency interpretation so long as it is reasonable.”<sup>157</sup>

### III. APPEALS OF ZONING CASES FROM SUPERIOR COURT

Two cases involving whether an appeal of a zoning case from superior court is direct pursuant to O.C.G.A. § 5-6-34<sup>158</sup> or requires an application pursuant to O.C.G.A. § 5-6-35 were decided during the survey period: *Sweet City Landfill, LLC v. Elbert County (Sweet City II)*<sup>159</sup> and *Carson v. Brown*.<sup>160</sup> These cases built on cases decided during the last survey period. Specifically, *Schumacher v. City of Roswell*,<sup>161</sup> modified the rule established in *Trend Development* that “appeals in

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155. *Id.* at 814 n.2, 2019 Ga. App. LEXIS 438 at \*21 n.2 (Coomer, J., dissenting).

156. *Id.* at 811, 2019 Ga. App. LEXIS 438 at \*13–14 (majority opinion).

157. *E.g.*, *City of Guyton v. Barrow*, 305 Ga. 799, 802, 828 S.E.2d 366, 369 (2019).

158. O.C.G.A. § 5-6-34 (2019) allows direct appeals for cases in which certain equitable remedies are sought in the superior court following denial of rezoning, such as a writ of mandamus to compel issuance of permits required for the land use requested or injunctive relief to prevent enforcement of the zoning ordinance against the requested use. O.C.G.A. § 5-6-34(a)(7) (2019). Though O.C.G.A. § 5-6-34(a)(4) allows a direct appeal from the “granting or refusing applications . . . for interlocutory or final injunctions” and O.C.G.A. § 5-6-34(a)(7) allows a direct appeal from the “granting or refusing to grant mandamus,” *Trend Development Corp. v. Douglas County*, 259 Ga. 425, 383 S.E.2d 123 (1989), still required an application for appeal even if mandamus and injunctive relief were sought in superior court. *Id.* at 426, 383 S.E.2d at 124. In support, the court in *Trend Development* referenced O.C.G.A. § 5-6-35(a)(1), which requires an application for “[a]ppeals from decisions of the superior courts reviewing decisions of . . . state and local administrative agencies, and lower courts by certiorari or de novo proceedings.” O.C.G.A. § 5-6-35(a)(1) (2019); *Trend Dev. Corp.*, 259 Ga. at 426, 383 S.E.2d at 124. However, the decision to zone property is a legislative decision, and the local government’s council or commission is not acting as a “local administrative agency” when it denies a rezoning application.

159. 347 Ga. App. 311, 818 S.E.2d 93 (2018).

160. 348 Ga. App. 689, 824 S.E.2d 605 (2019).

161. 301 Ga. 635, 803 S.E.2d 66 (2017).

zoning cases will henceforth require an application,”<sup>162</sup> by holding that a challenge to enactment of a new zoning ordinance is a legislative act challenged by direct appeal, as opposed to an appeal of a parcel-specific zoning decision which must proceed by application.<sup>163</sup> Additionally, *Diversified Holdings, LLP v. City of Suwanee*, held that: “the present appeal, which is from a superior court order affirming a local zoning board’s decision that the zoning regulations applied to a particular piece of property are not unlawful, is the type of individualized determination that remains subject to the application procedure set out in O.C.G.A. § 5-6-35(a)(1).”<sup>164</sup> Problems with these holdings related to ZPL were raised in last year’s survey.<sup>165</sup>

#### *A. Facial Challenge v. Parcel-Specific Decision*

In *Sweet City Landfill, LLC v. Elbert County*, the court of appeals, at the direction of the supreme court, reconsidered its prior dismissal of a zoning-related appeal for failure to follow the discretionary appeal process.<sup>166</sup> There, Sweet City Landfill, LLC (Sweet City) initially sought a declaratory ruling that it was not required to obtain a SUP for a “waste disposal facility,” or landfill.<sup>167</sup> The supreme court held that a facial challenge to the zoning ordinance did not require exhaustion of administrative remedies and remanded the case back to the trial court to consider the facial challenge to the zoning ordinance.<sup>168</sup>

After the case was remanded, the County amended and replaced the challenged ordinance to provide factors for consideration of an application for a SUP (instead of standards), in accordance with O.C.G.A. § 36-66-5.<sup>169</sup> With its ordinance amended, the county filed a

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162. *Trend Dev.*, 259 Ga. at 425, 383 S.E.2d at 123.

163. *Schumacher*, 301 Ga. at 639, 803 S.E.2d at 70.

164. *Diversified Holdings, LLP*, 302 Ga. at 605, 807 S.E.2d at 884.

165. Galloway & Jones, *supra* note 1, at 301. Two significant problems are apparent on the face of *Diversified Holdings*. First, the City Council denied Diversified Holdings’ rezoning application. The City Council is the legislative body of the City, not an advisory local zoning board and its zoning decision was a legislative act. Second, the Supreme Court’s distinction (in *Schumacher* and *Diversified Holdings*) between different types of zoning decisions ignores the plainly stated “zoning decisions” definitions in ZPL. Under O.C.G.A. § 36-66-3(4)(c) (2019), the rezoning of a single parcel is a legislative zoning decision, just like the adoption of a new zoning ordinance, and neither constitutes a decision of an administrative agency. But, ZPL is not mentioned in either *Schumacher* or *Diversified Holdings*.

166. *Sweet City Landfill, LLC*, 347 Ga. App. at 312, 818 S.E.2d at 95.

167. *Id.*

168. *Elbert Cty. v. Sweet City Landfill, LLC*, 297 Ga. 429, 432–34, 436, 774 S.E.2d 658, 662–63, 665 (2015).

169. *Sweet City II*, 347 Ga. App. at 313, 315–16, 818 S.E.2d at 96–97.

motion to dismiss contending that Sweet City's claims were moot. The trial court granted the motion and Sweet City appealed.<sup>170</sup>

Reviewing *Schumacher*, the court held that the appeal was not a "zoning case" and could be directly appealed.<sup>171</sup> After the supreme court remanded the case, only the facial constitutional challenge to the county's solid waste ordinance under the dormant Commerce Clause remained. Since the enactment of a zoning ordinance is a legislative act,<sup>172</sup> the County's failure to take action on the SUP was not a decision of an administrative agency that required a discretionary appeal under O.C.G.A. § 5-6-35(a)(1).<sup>173</sup> In *Schumacher*, the challenge was a purely facial attack,<sup>174</sup> while the challenge in *Sweet City II* originated with an attempt to obtain a SUP which was later determined to not be required.<sup>175</sup> Sweet City's challenge would have required a discretionary appeal, but-for the county's failure to act on the SUP application. As a result, "no individualized determination about a particular property" within the meaning *Schumacher* was made.<sup>176</sup> *Sweet City*, therefore, was not a "zoning case" and could proceed by direct appeal.<sup>177</sup>

In a footnote, the court addressed the requirement in *Trend Development* that zoning decision appeals proceed by application as an appeal from an administrative agency asking whether a local government as "an elected body, [can] properly be labeled an 'administrative agency' under any circumstances . . ."<sup>178</sup> The court noted that *Schumacher* resolved the issue by "focus[ing] on the function being performed by the [local government] to determine if it was acting" in an administrative, legislative, or quasi-judicial capacity.<sup>179</sup> This effectively requires a case-by-case analysis to determine whether the appeal may proceed directly or only by application, creating confusion, uncertainty, and risk for each appeal.

Further, the court held that Sweet City's challenge was moot as a result of the new ordinance.<sup>180</sup> Mootness is a jurisdictional issue that should be addressed before any substantive claims. Therefore, the trial

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170. *Id.* at 313, 818 S.E.2d at 96.

171. *Id.* at 315, 818 S.E.2d at 97.

172. *See* O.C.G.A. § 36-66-3(4).

173. *Sweet City II*, 347 Ga. App. at 315, 818 S.E.2d at 97.

174. *Schumacher*, 301 Ga. at 635, 803 S.E.2d at 67.

175. *Sweet City II*, 347 Ga. App. at 313, 818 S.E.2d at 95-96.

176. *Id.* at 315, 818 S.E.2d at 97.

177. *Id.*

178. *Id.* at 314 n.1, 818 S.E.2d at 97 n.1.

179. *Id.*

180. *Id.* at 317, 818 S.E.2d at 98-99.

court did not err in addressing mootness first.<sup>181</sup> The court also upheld the trial court's refusal to analyze Sweet City's vested rights claim which required the county to deny a permit first.<sup>182</sup> Here, the county took no action on the SUP application. Consequently, *Schumacher* requires a final administrative decision, even if the underlying dispute is a "zoning case."<sup>183</sup>

*B. Failure to Issue a Land Disturbance Permit is not a "Zoning Decision" under Schumacher—Carson v. Brown*

In *Carson v. Brown*, the court held that a mandamus action to force issuance of a land disturbance permit (LDP) is not a zoning decision under *Schumacher*.<sup>184</sup> Forsyth County enacted a thirty-day moratorium prohibiting certain types of residential developments. Thereafter, an LDP applicant filed a petition for writ of mandamus seeking to compel the Forsyth County Department of Planning and Community Development (the Department) to issue the permit.<sup>185</sup>

Generally, denial of a writ of mandamus is directly appealable.<sup>186</sup> But, an application for discretionary appeal is required if the underlying subject matter involves a zoning case or review of an administrative decision.<sup>187</sup> The court in *Carson* cited *State of Georgia v. International Keystone Knights of the Ku Klux Klan, Inc.*<sup>188</sup> in which the supreme court explained that:

[A] "decision"—as the term is used in O.C.G.A. § 5-6-35(a)(1) with reference to administrative agencies—is most naturally and reasonably understood to refer to an administrative determination of an adjudicative nature . . . . [However,] formal adjudicative procedures [are not required] . . . [The Court has] consistently . . . refused . . . to require applicants in cases concerning executive determinations and those involving rulemaking or other determinations of a legislative nature.<sup>189</sup>

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181. *Id.* at 317–18, 818 S.E.2d at 99.

182. *Id.* at 318, 818 S.E.2d at 99.

183. *Schumacher*, 301 Ga. at 639, 803 S.E.2d at 70.

184. *Carson*, 348 Ga. App. at 697, 824 S.E.2d at 613.

185. *Id.* at 690, 824 S.E.2d at 608.

186. O.C.G.A. § 5-6-34(a)(7).

187. *Carson*, 348 Ga. App. at 692, 824 S.E.2d at 609 (quoting *Selke v. Carson*, 295 Ga. 628, 629, 759 S.E.2d 853, 854 (2014)).

188. 299 Ga. 392, 788 S.E.2d 455 (2016).

189. *Carson*, 348 Ga. App. at 694 & n.19, 824 S.E.2d at 610–11 & n.19 (quoting *Int'l Keystone Knights of the Ku Klux Klan*, 299 Ga. at 404, 799 S.E.2d at 465).

For example, in *Mid-Georgia Environmental Management Group v. Meriwether County*,<sup>190</sup> a property owner properly filed a direct appeal from the denial of a petition for writ of mandamus seeking to compel the issuance of a zoning verification letter because it was not a “zoning decision” under O.C.G.A. § 5-6-35.<sup>191</sup>

In *Carson*, the department “releas[ed]” the LDP application “back to [the applicant] because of the moratorium,” but still asked the applicant to submit additional information.<sup>192</sup> The applicant complied with the request and then inquired about the application’s status. The county attorney responded, interpreting the “release” as a rejection of the application.<sup>193</sup> The court found that the “release” was not a rejection and, thus, not a decision for the purposes of O.C.G.A. § 5-6-35(a)(1).<sup>194</sup> Therefore, “the discretionary appeal procedure was not implicated,” and a direct appeal was proper.<sup>195</sup> Since no decision was made on the LDP application, Carson did not have to exhaust administrative remedies before seeking the writ of mandamus.<sup>196</sup>

However, the court also held that Carson could not challenge the constitutionality of the moratorium by a petition for writ of mandamus.<sup>197</sup> Instead, Carson should have filed “[a] declaratory judgment action [which] is an especially and particularly appropriate method of determining a controversy with respect to the constitutionality of a[] . . . legislat[ive]” act.<sup>198</sup> Moreover, sovereign immunity under *Lathrop*, bars a mandamus action against an official acting in their official capacity.<sup>199</sup> Because mandamus is a personal action against an official, individually, sovereign immunity did not bar the petition.<sup>200</sup> Thus, the trial court erred in dismissing the officials in their individual capacities from the mandamus action.<sup>201</sup>

Given these new authorities, the proper procedure by which a zoning-related case may be appealed remains in flux. When in doubt, zoning practitioners are well-advised to return to the practice of filing

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190. 277 Ga. 670, 594 S.E.2d 344 (2004).

191. *Id.* at 672, 594 S.E.2d at 347.

192. *Carson*, 348 Ga. App. at 694, 824 S.E.2d at 610.

193. *Id.*

194. *Id.* at 697, 824 S.E.2d at 612–13.

195. *Id.* at 697, 824 S.E.2d at 613.

196. *Id.* at 710, 824 S.E.2d at 621.

197. *Id.* at 705, 824 S.E.2d at 617–18.

198. *Id.* at 704, 824 S.E.2d at 617 (quoting *Harper v. Burgess*, 225 Ga. 420, 422, 169 S.E.2d 297, 299 (1969)).

199. *Id.* at 705, 824 S.E.2d at 618.

200. *Id.* at 706, 824 S.E.2d at 618–19.

201. *Id.* at 706, 824 S.E.2d at 619.

both direct appeals and applications for discretionary appeal in all zoning actions, as was done before *Trend Development*.

