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Zoning and Land Use Law

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During the Survey period,[1] the Supreme Court of the United States in *Knick v. Township of Scott*[2] gave aggrieved property owners in Georgia a federal taking claim for inverse condemnation resulting from a zoning regulation that the Georgia Supreme Court had previously denied them under state law in *Diversified Holdings, LLP v. City of Suwanee.*[3] The Georgia Court of Appeals further refined *York v. Athens College of Ministry*.[4] Finally (on a note inseparable with zoning), the Georgia Supreme Court encountered a case defining the parameters of the Georgia Open Meetings Act.

I. KNICK V. TOWNSHIP OF SCOTT: A TAKINGS CLAIM IN FEDERAL COURT

During this Survey period, the most significant change in Georgia zoning and land use law comes from the Supreme Court of the United States in *Knick v. Township of Scott*,[5] which changed the legal landscape governing inverse condemnation (i.e., regulatory taking) actions in Georgia. In *Knick*, the Supreme Court held that a property owner whose property has been taken through application of a regulation (zoning or otherwise) may bypass Georgia state courts and immediately pursue a

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[1] This article surveys zoning and land use decisions decided between June 1, 2019 and May 29, 2020. 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*, 71 MERCER L. REV. 363 (2019).

[2] *Knick v. Twp. Of Scott*, 139 S. Ct. 2162 (2019).

[3] 302 Ga. 597, 807 S.E.2d 876 (2017).

[4] 348 Ga. App. 58, 821 S.E.2d 120 (2018).

[5] 139 S. Ct. 2162, (2019).

damages claim in federal court under the Takings Clause of the Fifth Amendment to the Constitution of the United States[6] pursuant to 42 U.S.C. § 1983.[7] The expansion of property rights in *Knick* contrasts starkly with *Diversified Holdings,* in which the Georgia Supreme Court prohibited an analogous state-law taking claim resulting from inverse condemnation by zoning regulation.[8] As a result, *Knick's* impact on Georgia law is properly analyzed in this Survey of Georgia zoning and land use law.

A. The Facts and Holding of Knick

The bucolic facts of *Knick* belie its legal significance. Rose Mary Knick owned ninety acres in Scott Township, Pennsylvania. She lived in a single-family home on the property, grazing horses and farm animals in her pastures. Located on Ms. Knick's property is a small cemetery where family members and neighbors were allegedly buried.[9]

In 2012, Scott Township passed an ordinance that required "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours."[10] The ordinance allowed code enforcement officers to enter Ms. Knick's property to identify the existence and location of a cemetery. In 2013, a code enforcement officer visited Ms. Knick, entered her property, and found several grave markers. Ms. Knick was cited for violation of the ordinance.[11]

Ms. Knick was not amused. Initially, she filed suit in state court seeking declaratory and injunctive relief, contending that the Scott Township cemetery ordinance "effected a taking of her property."[12] This suit did not seek compensation for the taking of her property through an inverse condemnation claim, which was available to her under Pennsylvania law. While Ms. Knick's suit was pending, Scott Township (possibly recognizing its regulatory overreach) withdrew the violation notice. With the enforcement action terminated, the state court declined to rule on Ms. Knick's claims for injunctive and declaratory relief.[13]

Undeterred, Ms. Knick filed an action pursuant to 42 U.S.C. § 1983 in federal court alleging that the cemetery ordinance, as applied to her property, violated the Takings Clause of the Fifth Amendment.[14] Citing

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[6] U.S. CONST. amend. V.

[7] 42 U.S.C. § 1983.

[8] 302 Ga. 597, 807 S.E.2d 876 (2017).

[9] *Knick*, 139 S. Ct. at 2168.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,[15] the district court dismissed Ms. Knick's takings claim "because she had not [first] pursued an inverse condemnation action in state court."[16] The Third Circuit Court of Appeals affirmed the district court.[17] The Supreme Court granted certiorari to reconsider *Williamson* and determine whether "property owners must seek just compensation under state law in state court before bringing a federal taking claim under [Section] 1983."[18]

Based on the facts presented by Ms. Knick in support of her taking claim, the Supreme Court overruled, and decreed that "[c]ontrary to[,] *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it."[19] The Supreme Court went on to state that: "[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."[20] The Supreme Court's conservative majority (quoting the dissent of liberal Justice William Brennan in *San Diego Gas & Electric Company. v. San Diego*[21]) explained that "'once there is a 'taking,' compensation *must* be awarded because '[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation.'"[22] While compensation may remedy the taking later, the Court held that the constitutional violation occurs at the time of the taking, and it concluded that "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time."[23] The property owner is not required to exhaust state remedies before seeking relief in federal court.[24] Under *Knick*, a property owner with a

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[15] 473 U.S. 172 (1985).

[16] *Knick*, 139 S. Ct 2162 at 2169. The Court noted that an inverse condemnation claim is distinct from direct condemnation. Pennsylvania law recognizes an inverse condemnation claim. *Id.* at 2168.

[17] *Knick v. Twp. Of Scott*, 862 F.3d 310 (3d Cir. 2017).

[18] *Knick*, 139 S. Ct. 1262, 1269.

[19] *Id.* at 2170.

[20] *Id.*

[21] *Id.* at 2175; San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 624–26 (1981). San Diego Gas & Electric, a public utility, sued after the City of San Diego rezoned its property reducing the amount of industrially zoned land. The utility alleged a taking of its property by inverse condemnation.

[22] *Knicks*, 139 S. Ct. at 2172 (emphasis in original) (quoting *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (J.Brennan, dissenting)).

[23] *Id.*

[24] *Id.* at 2172–73.

valid taking claim is entitled to compensation as if it had been "'paid contemporaneously with the taking'—that is, the compensation must generally consist of the total value of the property when taken, plus interest from that time."[25]

B. Knick's Impact on Georgia Law

In *Knick*, the Supreme Court reached a legal conclusion diametrically opposed to the Georgia Supreme Court's recent decision in *Diversified Holdings.*[26] The Georgia Supreme Court held in *Diversified Holdings* that a taking of property through inverse condemnation from a zoning regulation action cannot occur unless "the owner [is] completely deprived of the use of the property."[27] It noted (citing supporting federal authorities) that a taking claim resulting from a zoning regulation is inconsistent with the theory of inverse condemnation and that "[u]nder a true takings challenge . . . , 'the focus of the takings analysis is on whether the government act takes property, not on whether the government has a good or bad reason for its action.'"[28] Zoning, the Georgia Supreme Court continued, "does not ordinarily present the kind of affirmative public use at the expense of the property owner that effects a taking,"[29] and it is "unlikely to be a fertile ground for inverse condemnation claims."[30]

To reach its decision, the court distinguished eminent domain from the exercise of the government's regulatory police power, such as zoning and land use restrictions.[31] Though the same distinction was noted by the Supreme Court in *Knick,*[32] the Georgia Supreme Court reached the opposite conclusion in *Diversified Holdings*.[33] Under Georgia law, a takings claim is viable only when the government exercises the power of eminent domain, not when the taking results from a zoning regulation—although the plain text of the Just Compensation Clause of the Constitution of the State of Georgia[34] indicates otherwise.[35]

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[25] *Id.* at 2170 (quoting D. Dana & T. Merrill, Property: Takings 262 (2002)).

[26] The holding of *Diversified Holdings* was discussed in *Zoning and Land Use*, *Annual Survey of Georgia Law*, 70 Mercer L. Rev. 301 (2018).

[27] 302 Ga. at 608, 807 S.E.2d at 886.

[28] *Id.* at 609–10, 807 S.E.2d at 887 (quoting Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 354 (2005)).

[29] *Id.* at 610, 807 S.E.2d at 878.

[30] *Id.*, 807 S.E.2d at 877.

[31] *Id.* at 607–08, 807 S.E.2d at 886–88.

[32] 139 S. Ct. at 2168.

[33] 302 Ga. at 610, 807 S.E.2d at 887.

[34] GA. CONST. of 1983, art. I, §3, para. 1.

[35] *Diversified Holdings, LLP*, 302 Ga. at 615, 807 S.E.2d at 891 (J., Peterson, concurring):

In *Diversified Holdings*, Georgia Supreme Court held:

> The balance our law strikes is that a zoning classification that substantially burdens a property owner may be justified if it bears a substantial relation to the public health, safety, morality, or general welfare . . . . Lacking that kind of justification, the zoning may be set aside as arbitrary or capricious. If a land-use regulation is arbitrary and capricious then the regulation cannot stand. The remedies available in such cases include declaring the regulation unlawful as applied to the property at issue, although we've been clear that courts should give local governing bodies a reasonable opportunity to reconsider rezoning applications or otherwise take action to confirm their regulations to the law.[36]

As a result, under *Diversified Holdings*, a Georgia property owner's property cannot be "taken" by inverse condemnation from a zoning restriction, and the value of the property "taken" is not compensable by damages.[37] The property owner must challenge the zoning regulation in court and prove that the regulation is a substantial burden on the property and not substantially related to the public health, safety, morality, or general welfare, or is arbitrary and capricious.[38] If the property owner makes either showing, the zoning regulation will be declared unlawful, and the court will remand the case back to the zoning authority, which will be given the opportunity to cure the zoning regulation's arbitrariness and capriciousness.[39]

> The text of our Just Compensation Clause appears broader than the federal Takings Clause. The Takings Clause reads 'nor shall private property be taken for public use, without just compensation.' U.S. Const. Amend. V. But the Just Compensation Clause provides (subject to a variety of subsequent textual exceptions) that 'private property shall not be taken *or damaged* for public purposes without just and adequate compensation *being first paid*.' GA. CONST. of 1983, art. I, § 3, para. 1(a) (emphasis supplied). This textual difference between the Clauses seems to me significant enough to raise questions about the validity of our caselaw often interpreting the Clauses as essentially the same. Answering those questions would require our careful consideration of text, context, and history. And this provision of the Georgia Constitution has a particularly complex history; although present in every Constitution since 1861, its form has changed in some fashion in each new Constitution. But no party has raised or briefed such issues here, and so I leave them for another day.

Id.

[36] *Id.*, 807 S.E.2d at 888.

[37] *Id.* at 611, 807 S.E.2d at 888.

[38] *Id.*, 807 S.E.2d at 888. This requirement appears consistent with the Georgia appellate courts' efforts to transform legislative zoning decisions into quasi-judicial administrative actions which are reviewed under an "arbitrary and capricious" standard. *See e.g.*, City of Cumming v. Flowers, 300 Ga. 820, 792 S.E.2d 846 (2017).

[39] *See Diversified Holdings, LPP*, 302 Ga. at 611, 807 S.E.2d at 888.

When the holdings of *Knick* and *Diversified Holdings* are applied to the facts in *Knick*, the contradictory results are striking. In *Knick*, the regulation applied to Ms. Knick's property constituted a taking at the time of enactment, and she was entitled to damages for the taking and interest from that date.[40] Under *Diversified Holdings* (if Ms. Knick's farm had been in Georgia), the zoning authority's zoning regulation could not have taken Ms. Knick's property. Instead, she would have been required to prove in court that the zoning regulation failed one of the tests under *Diversified Holdings*. If her challenge succeeded, Ms. Knick's case would have been remanded to the zoning authority to correct the regulation, giving the zoning authority a "redo," while Ms. Knick remained uncompensated. These results could not be more different.

C. Choosing a Zoning Remedy and Forum under Knick

After the *Knick* opinion, significant speculation questioned its impact. Initial reactions suggested that *Knick* will increase the amount of federal litigation involving local zoning issues as more regulatory taking claims are asserted alleging a broader range of possible takings.[41] Even in states that allow a taking claim for inverse condemnation, increased federal litigation is inevitably expected. Also, suits for damages resulting from the taking of property by zoning regulation that assert state law claims in addition to Section 1983 claims, will present more problems associated with the federal courts' pendant, or supplemental jurisdiction.

However, the response to *Knick* in Georgia may be more dynamic since *Diversified Holdings* prohibits an inverse condemnation taking claim under Georgia law from a zoning regulation. After *Knick*, an aggrieved property owner in Georgia can choose between cumulative remedies and forums. The property owner may now:

a. Seek a declaration that the zoning regulation is unlawful and cannot be applied to the owner's property; and
b. If the claim is brought in federal court, seek a damage claim resulting from the taking of property under 42 U.S.C. § 1983.

Knick provides a direct path to federal court for relief for the aggrieved property owner. Of course, the property owner may bring a damage claim under 42 U.S.C. § 1983 in federal court, and the federal court will have pendant jurisdiction over state law claims. *Knick* opens the door directly to federal relief.

Different evidentiary standards may also be a factor favoring the aggrieved property owner's decision to seek federal relief. A taking claim in federal court should follow the path of a traditional Section 1983 case

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[40] *Knick*, 139 S. Ct. at 2172.

[41] Dwight Merriam, *Rose Mary Knick and the Story of Chicken Little,* MUNICIPAL LAWYER, 653–654 (July–August, 2020).

seeking damages which will be resolved by a preponderance of the evidence standard.[42] For state law claims, the burden on the aggrieved property owner will give the zoning authority the benefit of having the legality of the decision assessed to determine whether (1) there was "any evidence" to support it, if it was a quasi-judicial decision; (2) if it was a legislative decision, whether the current zoning regulation substantially burdens a property and, if it does, whether that regulation is substantially related to the public health, safety, morality, or general welfare; or (3) for either classification, "[w]hether the [authority] acted beyond the discretionary powers conferred upon it, abused its discretion, or acted arbitrarily or capriciously with regard to an individual's constitutional rights."[43] A successful challenge to a zoning regulation when it is reviewed under the "any evidence" rule will be rare, unless it can be shown that the zoning authority acted egregiously or in bad faith. Likewise, legislative actions are presumptively valid.[44] As a result, the distinction between the evidentiary standards may make a federal action more appealing to the aggrieved property owner.

However, there may be a downside to federal relief if the pursuit of a damage claim allowed by *Knick* precludes remedies declaring the zoning regulation arbitrary and enjoining its enforcement, as allowed by *Diversified Holdings*. Prior to *Diversified Holdings*, the aggrieved party owner's complaint would have alleged counts seeking both (1) damages resulting from the taking; and (2) injunctive and declaratory relief to declare the zoning regulation void and to enjoin its enforcement. Generally, these declaratory and injunctive remedies are not available to a property owner who has an adequate remedy at law through damages awarded as a result of the taking.[45] Consequently, the damages awarded for the taking of property by *Knick* may preclude injunctive and declaratory relief available under *Diversified Holdings.* If the property owner's ultimate goal is to develop the property which is taken by the zoning regulation, injunctive and declaratory relief may be better remedies than damages. Damages will compensate the aggrieved owner for the value of the taking, but the regulation may remain in place.

II. GEORGIA COURT OF APPEALS DECISIONS REGARDING SPECIAL USE PERMITS FUTHER REFINE CITY OF CUMMING V. FLOWERS

A. A Brief History of the Turbulent Classifications of Zoning and Land

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[42] Hous. Auth. Of Augusta v. Gould, 305 Ga. 545, 553–54, 826 S.E.2d 107, 113 (2019).

[43] Clayton County v. New Image Towing and Recovery, Inc., 351 Ga. App. 340, 342–43, 830 S.E.2d 805, 808 (2019); *Diversified Holdings, LLP*, 302 Ga. 661, 807 S.E.2d at 889.

[44] 301 Ga. at 612, 807 S.E.2d at 889.

[45] O.C.G.A. § 23-1-4 (2020).

Use Decisions

In *City of Cumming v. Flowers*,[46] the Georgia Supreme Court held that a "quasi-judicial" decision by a local government official, board, or governing authority must be appealed by petition for writ of certiorari to superior court.[47] The impact of *City of Cumming* (and its progeny) was discussed in each Survey after it issued, and the distinction between whether a local government decision is legislative or a quasi-judicial decision has become critically important.[48] A legislative zoning decision may be directly appealed and a de novo standard of review is applied to law and facts, with new evidence permissibly introduced.[49] A quasi-judicial decision is appealed by petition for writ of certiorari to the superior court which sits as an appellate judiciary.[50] 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.[51] The court still reviews legal issues de novo, albeit with some deference to the local government.[52]

The adoption of a zoning ordinance and/or map along with the rezoning of a specific parcel (which amends the zoning map) have historically been deemed to be legislative actions.[53] Decisions on variances, plat approval (preliminary and final), and approval of building and construction permits have long been deemed quasi-judicial since they do not amend the local government's zoning ordinance.[54] These characterizations

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[46] 300 Ga. 802, 797 S.E.2d 846 (2017).

[47] *City of Cumming*, 300 Ga. at 833–34, 797 S.E.2d at 857.

[48] 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." *York*, 348 Ga. App. 58, 60, 821 S.E.2d 120, 123 (quoting *Diversified Holdings, LLP*, 302 Ga. at 601–02, 807 S.E.2d at 882). 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. In other words, those decisions are "'*tightly controlled by the ordinance*.'" RCG Properties, LLC v. City of Atlanta Bd. of Zoning Adjustments, 260 Ga. App. 355, 361, 579 S.E.2d 782, 787 (2003) (a special use permit case) (quoting LaFave v. City of Atlanta, 258 Ga. 631, 632, 373 S.E.2d 212, 213 (2003) (emphasis added) (a variance case)).

[49] Stendahl v. Cobb Cnty, 284 Ga. 525, 525–27, 668 S.E.2d 723, 726 (2008).

[50] 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. § 4-12(b)] is effectively the same as the any-evidence standard.'").

[51] O.C.G.A. § 5-4-12 (2020); *York*, 348 Ga. App. at 63, 821 S.E.2d at 125.

[52] *See e.g., Clayton Cnty*, 351 Ga. App. at 347, 830 S.E.2d at 811.

[53] *See* City Council of Augusta v. Irvin, 109 Ga. App. 598, 600, 137 S.E.2d 82, 84 (1964); *see also* Barrett v. Hamby, 235 Ga 262, 265, 219 S.E.2d 399, 401 (1975).

[54] *See Cumming*, 300 Ga. App. at 820, 797 S.E.2d at 848; *RCG Properties, LLC*, 260 Ga. App. at 361, 579 S.E.2d at 786 (2003); Emory Univ. v. Levitas, 260 Ga. 894, 896–97, 401 S.E.2d 691, 694 (1991):

precede and are consistent with the definition of a "zoning decision," under the Georgia Zoning Procedures Law (ZPL),[55] as a final legislative action by a local government which results in a zoning ordinance being adopted or textually amended or an amendment to the zoning map when property is rezoned or annexed into a municipality.[56] However, ZPL also defines as a legislative, zoning decision "the grant of a permit relating to a special use of property."[57]

Though a variance was at issue in *City of Cumming*, dicta therein suggested that the Supreme Court might apply its holding to an appeal of a decision involving a "permit relating to a special use of property [an (SUP)]." An SUP approves 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.[58] 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.[59]

In fact, the Georgia Supreme Court applied *City of Cumming* to an SUP in *York v. Athens College of Ministry, Inc.*[60] A majority of the court in *York* 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,[61] and the superior court's review was limited to the "any evidence" standard.[62] Having failed to challenge the opponents' standing below, Athens College of Ministry (ACM) and the County could not challenge the opponents' standing for the first time on appeal in superior court.[63]

> 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.

Id.

[55] O.C.G.A. §§ 36-66-1–36-66-6 (2020).

[56] O.C.G.A. § 36-66-3(4) (2020).

[57] *Id.*

[58] City of Atlanta v. Wansley Moving & Storage Co., 245 Ga. 794, 267 S.E.2d 234, 235 (1980).

[59] *City of Cumming*, 300 Ga. at 826 n. 5, 797 S.E.2d at 853 n. 5.

[60] 348 Ga. App. 58, 821 S.E.2d 120.

[61] *York*, 348 Ga. App at 61, 821 S.E.2d at 124 (citing *City of Cumming*, 300 Ga at 823–24, 797 S.E.2d at 850–51).

[62] *Id.* 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 capacity, the trial court is bound by the facts and evidence presented to the administrative body.").

[63] *Id.* at 60, 821 S.E.2d at 123. The *York* majority 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.'" *Id.* at

In an attempt to reconcile ZPL with its decision, the *York* majority noted that ZPL "defines a 'zoning decision,' not [an SUP] or 'special use approval decision.'"[64] Judge Goss's dissent in *York* distinguished *City of Cumming* based on a textualist interpretation of ZPL, finding a distinction between an SUP that involves the change in use of land to a use "potentially incompatible with uses allowed in the particular zoning district" and an SUP that does not involve a change in use of the real estate at issue.[65]

Despite the results in *City of Cumming* and *York*, since *Guhl v. Holcomb Bridge Road Corporation*[66] was decided in 1977, Georgia law has required local governing authorities to analyze objective criteria when taking action on a rezoning application, a legislative act. In *Guhl*, the Georgia Supreme Court established the factors that must be considered to determine whether the current zoning district applied to property is constitutional.[67] *Guhl's* requirements are established precedent. Analysis of a rezoning application under the *Guhl* factors (and its lineage) is required when a local government's decision on a rezoning application is appealed to superior court.[68] *Guhl's* factors foreshadowed ZPL which 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

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

[64] *Id.* at 61–62 (quoting O.C.G.A. § 36-66-3(4)). 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." *Id.* at 62.

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

[66] 238 Ga. 322, 232 S.E.2d 830 (1977).

[67] *Guhl*, 238 Ga. at 323–24, 232 S.E.2d at 831–32. (citing La Salle National Bank v. County of Cook, 60 Ill. Ap. 2d 39, 51, 208 S.E.2d 430, 436 (1965)). Those factors are as follows:

> (1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning districts; (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 (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.

Id.

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

unrestricted use of property."[69] During the Survey period, two SUP cases revisited the same question: how to distinguish between quasi-judicial and legislative decisions under *City of Cumming* and *York,* and the same court reached different, potentially irreconcilable conclusions in each.

B. Riverdale Land Group, LLC v. Clayton County—the Georgia Court of Appeals Holds Approval of an SUP is a Quasi-Judicial Decision

In *Riverdale Land Group, LLC v. Clayton County*,[70] the Riverdale Land Group (RLG) applied for an SUP to construct and operate a gas station.[71] The Clayton County Board of Commissioners (BOC) denied the SUP application.[72] RLG filed a petition for writ of mandamus action appealing the denial of RLG's application.[73] The Georgia Court of Appeals held that a writ of mandamus was not a proper mechanism to challenge the BOC's denial of the SUP application because the SUP was quasi-judicial.[74] "[When] an official or agency's action is 'subject to review by certiorari, the writ of mandamus is unavailable.'"[75] Because RLG did not petition for a writ of certiorari, it waived its constitutional claims.[76]

To determine whether the denial was a quasi-judicial act, the Court relied on *Housing Authority of City of Augusta v. Gould*,[77] (decided after *City of Cumming*) which set forth the following three characteristics indicative of a quasi-judicial decision.[78] First, a quasi-judicial act occurs when all parties are entitled to notice and a hearing with the opportunity to present evidence under judicial forms of procedure.[79] Second, a quasi-judicial act is a decision-making process that (quasi-) legislative law requires be made applying relevant facts to pre-existing (i.e. codified) legal standards.[80] Third, a quasi-judicial act is final and binding on the rights of interested parties.[81] The court also recited the Georgia Supreme Court's prior characterization of administrative determinations as being

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[69] O.C.G.A. § 36-6-5 (2020). ZPL also requires that local governments "adopt policies and procedures which govern calling and conducting hearings required by [ZPL Section 4]."

[70] 354 Ga. App. 1, 840 S.E.2d 132 (2020).

[71] *Id.* at 1–2, 840 S.E.2d at 133.

[72] *Id.*, 840 S.E.2d at 133.

[73] *Id.* at 2, 840 S.E.2d at 133.

[74] *Id.* at 3, 840 S.E.2d at 134; O.C.G.A. § 5-4-1 (2020).

[75] 354 Ga. App. 3, 840 S.E.2d at 134 (quoting Bibb Cnty. v. Monroe Cnty., 294 Ga. 730, 734, 755 S.E.2d 766 (2014)).

[76] *Id.* at 9–10,840 S.E.2d at 138.

[77] 305 Ga. 545, 826 S.E.2d 107 (2019).

[78] *Id.* at 551, 826 S.E.2d at 111–12.

[79] *Id.*, 826 S.E.2d at 111–12.

[80] *Id.*, 826 S.E.2d at 111–12.

[81] *Id.*, 826 S.E.2d at 111–12.

particular and immediate, and legislative decisions as general and prospective.[82]

Like the *York* court, the court in *Riverdale Land Group, LLC* found the facts at issue substantially similar to those presented in *City of Cumming*, and held that the BOC's decision on the SUP was quasi-judicial.[83] As in *City of Cumming*, the applicant was required by the applicable ordinance to submit detailed information regarding a "specific piece of property," and the ordinance also required the BOC to "determine 'the facts and apply the ordinance's legal standards to them, . . . a decision-making process akin to a judicial act.'"[84] Additionally, the ordinance required the BOC to hold a public hearing, give notice of the hearing to the parties, and make a decision that was particular and immediate.[85]

In a footnote, the *Riverdale Land Group, LLC* court quoted the *City of Cumming* court's assessment that "'it is not clear that [SUP] cases are meaningfully different from variance cases in [the context of determining whether certiorari relief is available] at least in the cases where the zoning board must apply a set of factors set out in the zoning ordinance to the specific facts [of the SUP].'"[86] The court further noted that whether the decision is "tightly controlled" by the ordinance is only one factor the court considers when determining whether a decision is quasi-judicial or legislative.[87] The court recited the declaration in *City of Cumming* that "[s]ubstance matters far more than form, and the courts need not capitulate to the label that a government body places on its action," in ordinance, pleading, or statute.[88] To that end, like in *York*, the court in *Riverdale Land Group* held that ZPL's characterization of SUPs as legislative zoning decisions was not determinative.[89] The court, in another footnote, rejected RLG's argument that *City of Cumming* was distinguishable because the variance ordinance in *City of Cumming* required that all factors under the ordinance *must* be satisfied before a variance could be granted and the SUP ordinance in *Riverdale Land*

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[82] *Riverdale Land Group, LLC*, 354 Ga. App. at 4, 840 S.E.2d at 134 (quoting *Int'l Keystone Knights of the Ku Klux Klan, Inc.*, 299 Ga. at 401, 788 S.E.2d at 463).

[83] *Id.* at 5, 840 S.E.2d. at 135. In *City of Cumming*, homeowners sought a writ of mandamus regarding the board of zoning's decision to grant a setback variance to a neighboring developer. *City of Cumming*, 300 Ga. at 820.

[84] *Id.* at 6, 840 S.E.2d at 136 (quoting *City of Cumming*, 300 Ga. at 823).

[85] *Id.* at 6–7, 840 S.E.2d at 136 (finding that the Board's decision was final, binding, and conclusive of the rights of the parties).

[86] *Id.* at 4, 840 S.E.2d at 135 n.16 (quoting 300 Ga. 827 (2017)).

[87] *Id.* at 6 n. 23, 840 S.E.2d at 136.

[88] *Id.* at 8, 840 S.E.2d at 137.

[89] *Id.,* 840 S.E.2d at 137.

Group stated that the board *may* examine factors.[90] But, a few days later, the Georgia Court of Appeals reached a different conclusion on another SUP case.

C. Davis v. Rockdale Art Farm, Inc.: the Georgia Court of Appeals Followed ZPL and Held that Approval of an SUP can be Legislative.

In *Davis v. Rockdale Art Farm, Inc.*, [91] the Rockdale County Board of Commissioners (BOC) granted an SUP for a creative arts learning center. Owners of properties approximately three-tenths of a mile from, and at a higher elevation than, the arts center (collectively, the neighbors) appealed the BOC's decision by petition for writ of certiorari to superior court.[92] The neighbors alleged they would suffer from increased noise, light pollution, and traffic as a result of the art center.[93] The local government and the applicant challenged the neighbors' standing for the first time on appeal.[94]

The Georgia Court of Appeals found the BOC's approval of the SUP was a legislative action because it was based on a discretionary determination by the BOC as to whether the application satisfied certain criteria or conditions prescribed by ordinance.[95] Because the decision was legislative, the court held the county was not required to raise the standing of the neighbors at the hearing before the BOC on the SUP.[96]

Whether a party has standing to challenge a zoning decision has long been determined through the application of the two-step "substantial interest-aggrieved citizen" test.[97] "First, . . . a person claiming to be aggrieved must have a substantial interest in the zoning decision, and second, . . . this interest [must] be in danger of suffering some special damage or injury not common to all property owners similarly situated."[98] The court found the neighbors failed to satisfy this test because they did not distinguish how the alleged adverse effects resulting

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[90] *Id.* at 4 n. 16, 840 S.E.2d at 135.

[91] 354 Ga. App. 82, 840 S.E.2d 160 (2020).

[92] *Id.* 82–83, 840 S.E.2d 161–62.

[93] *Id.* at 83, 840 S.E.2d at 162.

[94] *Id.* at 84, 840 S.E.2d at 162.

[95] *Id.* at 86, 840 S.E.2d at 164. The Court further reasoned that zoning power is legislative because the purpose of an SUP is "to authorize a type of land use potentially incompatible with uses allowed in the particular zoning district, with issuance of the permit predicated upon compliance with conditions set out in the ordinance, or in the discretion of the local zoning authority." *Id.* at 85, 840 S.E.2d at 163.

[96] *Id.* at 86, 840 S.E.2d at 164.

[97] Massey v. Butts County, 281 Ga. 244, 246–48, 637 S.E.2d 385, 387–88 (2006).

[98] DeKalb Cnty. v. Wapensky, 253 Ga. 47, 48, 315 S.E.2d 873, 875 (1984).

from the art center would harm them differently from other property owners in the area.[99]

The court went on to hint at (but not elucidate) a further distinction between quasi-judicial and legislative decisions—the standing of public opponents to be heard by the governing authority. The court quoted *Powers Ferry Civic Association v. Life Insurance Company of Georgia*,[100] as follows: "'the standing of neighbors to [appeal a] rezoning granted a property owner' and 'the standing of neighbors to be heard by a governing authority when considering a proposed zoning change are two separate and distinct things.'"[101] The court stated in *Davis*,

> [t]o hold otherwise would, as the county appellees argue[d], require an agency, "to include as a part of its preliminary announcements, prior to each and every meeting, that the specific agency objects to the standing of each and every applicant and application as to any determination that may or may not be made by the agency in order to preserve affirmative defense."[102]

In essence—although not entirely to the catastrophic result suggested by the county—that was the effect of the majority decision in *York*. After *York*, in order to preserve all issues for appeal in case the decision was deemed to be quasi-judicial, many zoning applicants (including those represented by the Authors) tendered (and will continue to tender) written, broad legal objections of every conceivable kind and iteration and tie those objections to specific facts in the application material or presented at the public hearing.

At first glance, the court's decision in *Davis* appears in every respect to conflict with the majority decision in *York* and *Riverdale Land Group*. The ordinance at issue in *York* required a County Board of Commissioners to give "due consideration" to ten "objective criteria" set forth in the ordinance.[103] The court in *York* held that the SUP decision was quasi-judicial because "although the grant of the [SUP] ultimately authorized a change in use of land, . . . the [SUP was] . . . 'sought under terms set out in the ordinance,' and the [governing authority] therefore acted in a 'quasi-judicial capacity to determine the facts and apply the law.'"[104] In contrast to the ordinances in *York* and *Riverdale Land Group*, the ordinance in *Davis* "specifically direct[ed] the Board to use its

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[99] *Davis*, 354 Ga. App. at 165, 840 S.E.2d at 88.

[100] 250 Ga. 419, 297 S.E.2d 477 (1982).

[101] *Davis*, 354 Ga. App. at 87, 840 S.E.2d at 164 (quoting *Powers*, 250 Ga. at 421, 297 S.E.2d at 478).

[102] *Id.*, 840 S.E.2d at 164.

[103] *York*, 348 Ga. App at 58, 821 S.E.2d at 122.

[104] *Id.* at 63, 821 S.E.2d at 125.

discretion and to consider other factors, including 'the consistency of the application with the comprehensive plan.'"[105]

The difference between the majority in *York* and in *Davis* is that the court in *Davis* may have finally given due consideration and deference to the legislative pronouncement in ZPL that approval of an SUP is a final legislative act by a local government.[106] Specifically, the court found that the SUP was a zoning decision or legislative act because it authorized a type of land use potentially incompatible with the primarily agricultural and residential uses allowed in the underlying zoning district.[107]

The decisions defined by ordinance in both *York*, *Riverdale Land Group*, and *Davis* could be deemed legislative. The only discernable difference appears to be the use of the words "due consideration," "may," and "discretion," respectively, in the ordinances describing the local government decisions at issue in each case.[108] Therefore, under the *York/Davis* dichotomy, the only difference between a quasi-judicial and a legislative decision is the use of the word "discretion" or similar language. Of course, after *York*, "due consideration" does not automatically make a local government's decision legislative. However, using this framework, decisions that historically have been quasi-judicial, such as a variance or plat approval, could be legislative if discretionary language is in the ordinance. The converse is also true—in the absence of the language of discretion, a historically legislative decision (such as a rezoning) could be quasi-judicial. On appeal, the appellate path for quasi-judicial decisions, certiorari proceedings in superior court, are procedurally more favorable to local governments because of, for example, the deferential "any evidence" standard. Thus, in light of *Davis*, it might benefit local governments to review their zoning ordinance for, and if necessary amend those ordinances to remove discretionary (or similar) language.

III. MILANI V. IRWIN—IMPACT TO THE VIEW FROM A NEIGHBOR'S PROPERTY IS STILL SUFFICIENT TO BESTOR THE NEIGHBOR WITH STANDING

In *Milani v. Irwin*,[109] a developer acquired in unincorporated DeKalb County one lot fronting on a small lake in an established single-family residential neighborhood.[110] While demolishing the existing single-family home on the lot, an activity permitted by the County's Planning

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[105] *Davis*, 354 Ga. App. at 86, 840 S.E.2d at 163–64.

[106] *Id.*, 840 S.E.2d at 164.

[107] *Id.*, 840 S.E.2d at 164.

[108] *See York*, 348 Ga. App. at 65, 821 S.E.2d at 126 (Goss, J., dissenting).

[109] 354 Ga. App. 218, 840 S.E.2d 700 (2020).

[110] *Id.* at 219, 840 S.E.2d at 702.

Director (the director), the developer cut down trees within the County's undisturbed buffer around a State Water, an unpermitted activity.[111] Some of those trees were also within the smaller twenty-five foot State Water buffer.[112] A variance from the State Water buffer was retroactively granted by the Environmental Protection Division of the Georgia Department of Natural Resources.[113] And, the County notified the developer that the tree removal was illegal. The developer applied for, and the director granted, a permit to replant trees within the county buffer.[114] The director also determined that the developer did not need a permit to build a seawall because, under the applicable ordinance, retaining walls of less than four feet do not require a permit.[115] The owners of the property directly across the lake from the lot at issue appealed the director's decisions to the DeKalb County Zoning Board (the Board), and the Board affirmed the director's issuance of the permit and the decision that the seawall did not require a permit.[116]

The neighbors further appealed by way of petition for writ of certiorari to the DeKalb County Superior Court.[117] The superior court sustained the petition finding that the Board erred in affirming the director's decision.[118] The developer filed a discretionary appeal with the Georgia Court of Appeals.[119] The developer argued that the neighbors failed to meet the substantial interest-aggrieved citizen test for standing in zoning cases.[120]

The court in *Milani* found that the neighbors satisfied the "substantial interest-aggrieved citizen" test and, as a result, had standing.[121] Specifically, the court found that "property owners 'who will bear the brunt of the changed conditions' . . . have a substantial interest in the

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[111] *Id.*, 840 S.E.2d at 702–03. A State Water is

> any and all river[], stream[], creek[], branch[], lake[], reservoir[], pond[], drainage system[], spring[], well[], and other bod[y] of surface or subsurface water, natural and artificial, lying within or forming a part of the boundaries of the State which [is] not entirely confined and retained completely upon the property of a single individual, partnership, or corporation, except[ing] . . . any project carried out under the technical supervision of the Natural Resources Conservation Service of the United States Department of Agriculture.

Ga. Comp. R. & Regs. 391-3-7-.01(aa)(2020); O.C.G.A. § 12-7-17(7)(2020).

[112] *Milani*, 354 Ga. App. at 219, 840 S.E.2d at 703; O.C.G.A. § 12-7-6(b)(15) (2020).

[113] *Id.* at 219–20, 840 S.E.2d at 703.

[114] *Id.* at 220, 840 S.E.2d at 703.

[115] *Id.* at 219–20, 840 S.E.2d at 703.

[116] *Id.* at 220, 840 S.E.2d at 703.

[117] *Id.*, 840 S.E.2d at 703.

[118] *Id.* at 221, 840 S.E.2d at 703.

[119] *Id.*, 840 S.E.2d at 704.

[120] *Id.* at 222–23, 840 S.E.2d at 704–05.

[121] *Id.* at 223, 840 S.E.2d at 705.

action" and may have standing.[122] Because the neighbors' lot was directly across the lake from the developer's property, the court reasoned that the homeowners had a particular and individualized concrete injury uncommon to other residents in the subdivision because of the "visual intrusion" presented by the developer's bare cut lot located directly across the lake from their property.[123]

The court also held the superior court properly sustained the homeowner's petition for certiorari because the tree replanting plan approved by the Board did not comply with the formula in DeKalb County ordinance for calculating the replanting requirements for illegally removed trees.[124] The developer's permitted plantings did not follow that formula. As a result, the director violated the ordinance.[125] Consequently, the trial court erred by not sustaining the petition for writ of certiorari.[126] *Milani* follows a line of cases finding standing where neighbors object to the impact to the view from their property (and corresponding reduction in property values) resulting from a local government's zoning or land use decision.[127]

IV. SWEET CITY LANDFILL, LLC V. LYON—THE OPEN MEETINGS ACT AND A RECURRING CASE

In *Sweet City Landfill, LLC v. Lyon*,[128] a proposed landfill in Elbert County again made its way to the Georgia Court of Appeals.[129] In this new, separate case, Sweet City claimed that in a private meeting prior to the public hearing on Sweet City's SUP, members of the Elbert County Board of Commissioners (BOC), in violation of the Georgia Open Meetings Act,[130] planned to vote against that SUP without discussion.[131]

The court first addressed Sweet City's claims for bad faith and intentional misconduct.[132] The court looked to the immunity from civil lability afforded to members of (among other things) the governing

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[122] *Id.* at 223, 840 S.E.2d at 705 (quoting *DeKalb Cnty.*, 253 Ga. at 49, 315 S.E.2d at 875.

[123] *Id.,* 840 S.E.2d at 705.

[124] *Id.* at 224, 840 S.E.2d at 706 (quoting DeKalb County Code § 14-39(p)(2)).

[125] *Id.* at 224–25, 840 S.E.2d at 706.

[126] *Id.*, 840 S.E.2d at 706.

[127] *See DeKalb Cnty.*, 253 Ga. at 47, 315 S.E.2d at 873; *see also* Hitch v. Vasarhelyi, 285 Ga. 627, 680 S.E.2d 411 (2009).

[128] 352 Ga. App. 824 (2019).

[129] For a background and analysis on the prior cases involving this project, please refer to Newton M. Galloway & Steven L. Jones, *Zoning and Land Use*, *Annual Survey of Georgia Law*, 71 Mercer L. Rev. 363 and Newton M. Galloway & Steven L. Jones, *Zoning and Land Use*, *Annual Survey of Georgia Law*, 69 Mercer L. Rev. 371.

[130] O.C.G.A. §§ 50-14-1–50-14-5 (2020).

[131] *Sweet City Landfill,* LLC, 352 Ga. App. at 825, 835 S.E.2d at 769.

[132] *Id.* at 827, 835 S.E.2d at 770.

authorities (and inferior zoning boards) of local governments under O.C.G.A. § 51-1-20(a), which provides as follows:

> A person serving with or without compensation as a member, director, or trustee, or as an officer of the board without compensation, of any nonprofit hospital or association or of any nonprofit, charitable, or eleemosynary institution or organization or of any local governmental agency, board, authority, or entity shall be immune from civil liability for any act or any omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless the damage or injury was caused by the willful or wanton misconduct of such person.[133]

The standard for bad faith is high. It "is not simply bad judgment or negligence" but instead, to prove bad faith, a litigant must show a dishonest purpose, willful conduct with an actual intention to harm, or wanton conduct that is so reckless or charged with indifference to the consequences as to justify the jury in finding a wantonness equivalent in spirit to actual intent.[134] The court held the BOC's actions were within its members official duties. The court further held that Sweet City did not plead that any action of the BOC was "adopted, taken, or made" in violation of the Georgia Open Meetings Act outside of a public meeting.[135] Sweet City failed to demonstrate bad faith because the action at issue took place during a public meeting.[136] Thus, the BOC members were entitled to statutory immunity.[137]

Additionally, Sweet City argued the Commission abused its power because it first decided to vote against the Sweet City landfill project in a private meeting, even though it later voted at a public meeting not to hear Sweet City's plan.[138] The court held Sweet City's abuse of power claim was rendered moot because the BOC publicly reaffirmed its actions in a later public meeting.[139]

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[133] *See* O.C.G.A. § 51-1-20(a) (2020).

[134] *Sweet City Landfill, LLC*, 352 Ga. App. at 828, 835 S.E.2d at 771 (quoting Culpepper v. Thompson, 254 Ga. App. 569, 570, 562 S.E.2d 837, 839 (2002).

[135] *Sweet City Landfill, LLC*, 352 Ga. App. at 827–28, 835 S.E.2d at 770.

[136] *Id.* at 828, 835 S.E.2d at 770–71.

[137] *Id.*, 835 S.E.2d at 771.

[138] *Id.* at 835, 835 S.E.2d at 775.

[139] *Id.*, 835 S.E.2d at 775. The court also held that (1) Sweet City did not allege facts sufficient for the statute of limitations under the Open Meetings Act to be tolled under O.C.G.A. § 9-3-96 due to the BOC's alleged fraudulent acts; *Id.* at 828, 835 S.E.2d at 771; (2) although "the trial court erred by not providing notice that it planned to consider matters outside the pleadings in rendering its decision [on the BOC's motion to dismiss], . . . the deficient notice in this case [was] not reversible error;" *Id.* at 832, 835 S.E.2d at 773; and (3) res judicata barred Sweet City's claims because "Sweet City [did] not identif[y] any

Sweet City Landfill, LLC clarified that members of a governing authority (or inferior zoning board) may, prior to and outside of a public hearing, permissibly discuss a pending land use or zoning application and decide how they will act on that application so long as the official action (i.e., vote) occurs during a public meeting. Of course, the local government must ensure that, if the action is arguably a quasi-judicial decision, the record is sufficiently preserved to satisfy the "any evidence" standard on appeal.

action by the [BOC] subsequent to events of the earlier case which deprived Sweet City of any rights relative to the proposed land fill project . . . ." *Id.* at 837, 835 S.E.2d at 776.