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# Zoning and Land Use Law

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This year and volume, the sixty-ninth, mark the phoenix flight of the Zoning and Land Use Law survey. The survey last appeared in the sixty-first volume[1] of the *Mercer Law Review*, just as the Great Recession was taking its toll on real estate development. The Great Recession shifted development activity away from constructing new buildings to protecting the value of investment in existing structures from the ravages of the landslide of foreclosures. At the height of the Great Recession, there was virtually no demand for new residential or commercial construction, and new construction and development ground to a halt. New commercial developments sat vacant. Thousands of recently platted residential subdivision lots were in foreclosure, with little or no chance of being developed.[2]

Local governments suffered huge revenue losses as income from building permits and impact fees dwindled to almost nothing. Local governments slashed their development and inspection personnel because revenues (usually generated by permit and impact fees) were insufficient to sustain them. Development-related businesses failed, and their employees, consulting engineers, and subcontractors suffered dire

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1. Dennis J. Webb Jr., et al., *Zoning and Land Use Law*, *Annual Survey of Georgia Law*, 61 MERCER L. REV. 427 (2009).

2. *See* Henry County Council for Quality Growth, Henry County Permit Analysis: 2005-09 (May 8, 2009) (on file with Author) (showing a 90% decrease in Single Family Building Permits issued in 2008 as compared to 2005); *see also* Dan Chapman, *Boom Goes Bust in Atlanta's Exurbs*, AJC.COM (Sept. 7, 2010, 8:09 AM), http://www.ajc.com/business/boom-goes-bust-atlanta-exurbs/HUJJamj8Ns9fdIr0mwtLZO/.

trickle-down economic consequences. With no new development, rezoning applications and development permit applications were unnecessary. Thus, there was no action to challenge. Except for foreclosure related issues, no development related litigation ensued.[3]

By late 2014, the Great Recession's damage was done. In certain geographic locales (largely urban and affluent), real estate development breathed new life. That trend continues today, and is evidenced by the many construction cranes towering above new development sites in Midtown Atlanta and Buckhead.

Though a large inventory of undeveloped property already approved for development remains, the number of new development proposals that require zoning review and approval is increasing almost everywhere. With new rezoning and development permit applications increasing and requiring more land use decisions, more judicial challenges are inevitable.[4]

As development ceased during the Great Recession, new justices and judges were elected or appointed to Georgia's appellate benches.[5] Before the Great Recession, it was difficult to get Georgia appellate courts to accept a development-related case. An application for appeal, which the

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3. *See* Henry County Council for Quality Growth, *supra* note 2 (showing a $4,361,437 decrease (-90%) in Impact Fee Revenue between 2005 and 2008).

4. Michael E. Kanell, *Atlanta's Housing Market Rebounds from the Recession*, MYAJC.COM (Nov. 13, 2017, 1:31 PM), http://www.myajc.com/business/atlanta-housing-market-rebounds-from-the-recession/JUGMTdXSvVYcGtXyFRnpGJ/.

5. Between 2008 and 2017, three justices left and five justices were appointed to the Georgia Supreme Court, and eleven judges left and fourteen judges were appointed to the Georgia Court of Appeals. *The Supreme Court of Georgia History*, GEORGIA SUPREME COURT, http://www.gasupreme.us/court-information/history (last visited Aug. 1, 2017); *Roster of Judges*, GEORGIA COURT OF APPEALS, http://www.gaappeals.us/history/roster.php, (last visited Aug. 1, 2017).

Of the Georgia Supreme Court, only three pre-recession justices, or about 33% of the nine-member court remain. *The Supreme Court of Georgia History*, *supra* (listing Robert Benham, 1990–1995 & 2001–present; Carol W. Hunstein, 1992–2009 & 2013–present; Harold Melton, 2005–present).

The size of the Georgia Supreme Court increased in 2016 from seven to nine justices. Ga. H.R. Bill 927, Reg. Sess., 2016 Ga. Laws 883, § 4-1 (codified as amended at O.C.G.A. § 15-2-1.1 (2017)). Only four pre-recession judges, or roughly 25%, of the fifteen-member court remain on the court of appeals. *Roster of Judges*, *supra* (listing Gary Blaylock Andrews, 1991–present; Anne Elizabeth Barnes, 1999–present; M. Yvette Miller, 1999–present; John J. Ellington, 1999–present).

In 2015, the number of judges on the Georgia Court of Appeals increased from twelve to fifteen members. Ga. H.R. Bill 279, Reg. Sess., 2015 Ga. Laws 919, § 1-2 (codified at O.C.G.A. § 15-3-1(a) (2017)).

court could grant (or not) in its discretion, was required,[6] irrespective of statutes that specifically authorize a direct appeal.[7] Post-recession, new development issues raised in new cases will be heard largely by new justices and judges.[8] This combination provides the opportunity for significant changes in Georgia's zoning and land use jurisprudence.

This Article reviews the first round of post-recession zoning and land use decisions of the new justices on the Georgia Supreme Court and judges on the Georgia Court of Appeals[9] issued between June 1, 2015 and May 31, 2017.[10]

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6. O.C.G.A. § 5-6-35(a)(1) (1989) (requiring application to appeal "decisions of the superior courts reviewing decisions of . . . state and local administrative agencies"); Trend Dev. Corp. v. Douglas Cty., 259 Ga. 425, 426, 383 S.E.2d 123, 124 (1989) (holding under O.C.G.A. § 5-6-35(a)(1), "all zoning cases appealed either to the Court of Appeals or the Supreme Court of Georgia must . . . come by application.").

7. O.C.G.A. § 9-6-28 (2004); Kappelmeier v. Iannazzone, 279 Ga. 131, 131, 610 S.E.2d 60, 61 (2005).

8. After the start of the Great Recession, 66% of the Georgia Supreme Court was appointed. *See The Supreme Court of Georgia History*, *supra* note 5. Roughly 75% of the Georgia Court of Appeals was appointed after the start of the Great Recession. *See Roster of Judges*, *supra* note 5.

9. As a survey of recent developments in Georgia zoning and land use law, this Article does not include federal decisions. However, recent federal cases—(1) Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (announcing a balancing factor test for regulatory taking claims); (2) Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (invalidating the town's sign ordinance because it was content based on its face, and effectively doing the same for most sign ordinances throughout the country); and (3) Buehrle v. City of Key West, 813 F.3d 973 (11th Cir. 2015) (holding, in a case of first impression for the United States Court of Appeals for the Eleventh Circuit, that the physical act of tattooing is artistic expression protected by the First Amendment of the United States Constitution and that the City of Key West's strict limit on the number of tattoo parlors in its historic district could not survive intermediate scrutiny)—are significant.

*Reed* will be reviewed in a special contribution for the Eleventh Circuit Survey which will appear in Volume 69, Number 4 of the *Mercer Law Review*. Newton M. Galloway & Steven L. Jones, *Eleventh Circuit Survey*, 69 MERCER L. REV. (forthcoming Summer 2018).

10. This Article does not review cases involving condemnation, nuisance, trespass, easement, or restrictive covenant cases. Additionally, this survey will not address recent annexation decisions decided just outside of the survey period. *See, e.g.*, City of Atlanta v. Mays, 301 Ga. 367, 801 S.E.2d 1 (2017).

The Authors were unable to cover every interesting planning and zoning case; some additional recommended cases are as follows: (1) Southern States-Bartow Cty., Inc. v. Riverwood Farms Homeowners Ass'n, 300 Ga. 609, 797 S.E.2d 468 (2017) (holding that a county's zoning ordinance requiring vested rights for non-conforming uses to be exercised within one year of an ordinance adoption was unconstitutional as applied to a property owner who acquired vested rights before the enactment of the new zoning code—which contained the reversion clause—but after the previous zoning code was invalidated by the court because the reversion clause operated as a retrospective law which injuriously

## I. ZONING APPEALS—THE LOCAL ORDINANCE APPEAL PROCEDURE DOES NOT MATTER[11]

In *City of Cumming v. Flowers*,[12] the Georgia Supreme Court addressed the appropriate procedure to challenge an unfavorable zoning or land use decision by a local government.[13] Though the court intended to implement a bright line rule setting the procedure to challenge a local government land use decision, *Cumming* actually raises as many questions as it answers. If applied broadly, *Cumming* is a very significant change in land use law.

In *Cumming*, the Board of Zoning Appeals (BZA) for the City of Cumming (the City) granted a developer a variance in accordance with the procedure required by the City's zoning ordinance. Neighboring homeowners filed a complaint in Forsyth County Superior Court challenging approval of the variance, seeking a writ of mandamus and injunctive relief against the City, the Mayor, the individual members of the City Council, and the "City Council and/or Members of the Board of Zoning Appeals"[14] (collectively, the City) and the developer. The City moved to dismiss the complaint. The motion to dismiss was treated as a motion for summary judgment to permit the trial court to consider City ordinances governing zoning appeals that were attached to the motion. The City argued that BZA's decision granting the variance was a "quasi-judicial" act, which could only be judicially reviewed pursuant to a writ

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affected the vested rights of a citizen in violation of article I, section 1, paragraph 10 of the Constitution of the State of Georgia); (2) Oasis Goodtime Emporium I, Inc. v. City of Doraville, 297 Ga. 513, 773 S.E.2d 728 (2015) (holding that a city's sexually-oriented business ordinance was content-neutral, and under intermediate scrutiny did not unconstitutionally infringe on the Freedom of Speech); and (3) Hoechstetter v. Pickens Cty., 341 Ga. App. 213, 799 S.E.2d 352 (2017) (holding that under the notice provision of the Zoning Procedures Law, O.C.G.A. § 36-66-4(a) (2017), a notice is not required at every stage of "the 'entire process'" of a "zoning decision;" it only has to be given once during the "continuous course of a zoning matter").

11. Just outside the survey period, the Georgia Supreme Court decided the following cases related to zoning appeals: (1) Lathrop v. Deal, 301 Ga. 408, 801 S.E.2d 867 (2017) (holding that sovereign immunity bars declaratory and injunctive relief against the state, its departments and agencies, and public officials in their official capacities for allegedly unconstitutional official acts) and (2) Schumacher v. City of Roswell, 301 Ga. 635, 803 S.E.2d 66 (2017) (holding that, although "zoning case[s]" require an application for discretionary appeal under O.C.G.A. § 5-6-35(a)(1), a constitutional facial challenge to an ordinance is not a "zoning case" and, therefore, can proceed to Georgia's appellate courts via direct appeal).

12. 300 Ga. 820, 797 S.E.2d 846 (2017).

13. *See id.*

14. *Id.* at 820, 797 S.E.2d at 849.

of certiorari.[15] The court agreed, but its opinion goes beyond the appeal of the variance that was requested.[16]

The Georgia Constitution authorizes local governments to adopt plans and exercise the power of zoning.[17] When a local government exercises its zoning power, its governing body is sitting as the local government's legislature performing a legislative, not judicial, act.[18] The enactment of a zoning ordinance is legislative.[19] The approval of a rezoning application, which amends the zoning ordinance and the zoning map with respect to a specific parcel, is also legislative.[20]

In fact, Georgia Zoning Procedures Law (the ZPL)[21] specifically identifies five actions that constitute "zoning decisions" which are (by definition) legislative acts:

> The adoption of a zoning ordinance;
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> The adoption of an amendment to a zoning ordinance which changes the text of the zoning ordinance;

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15. *Id.* at 820–22, 797 S.E.2d at 49.

O.C.G.A. § 5-4-5 provides as follows:

> (a) Before any writ of certiorari shall issue, except as provided in subsection (c) of this Code section, the party applying for the same, his agent, or his attorney shall give bond and good security, conditioned to pay the adverse party in the case the sums sought as an award to be recovered, together with all future costs, and shall also produce a certificate from the officer whose decision or judgment is the subject matter of complaint that all costs which may have accrued on the trial below have been paid. The bond and certificate shall be filed with the petition for certiorari, and security on the bond shall be liable as securities on appeal.
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> (b) The person authorized to receive bond and security may compel the security tendered to swear upon oath the means by which he can fulfill the bond obligation. Such action shall exonerate from liability the person receiving the bond and security.
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> (c) If the party applying for the writ of certiorari makes and files with his petition a written affidavit that he is advised and believes that he has good cause for certiorari to the superior court and that because of his indigence he is unable to pay the costs or give security, as the case may be, the affidavit shall in every respect answer instead of the certificate and bond above-mentioned.

O.C.G.A. § 5-4-5 (2017).

16. *See Cumming,* 300 Ga. at 820–22, 797 S.E.2d at 49.

17. GA. CONST. art. IX, § 2, para. 4.

18. *See infra* text accompanying notes 21–22.

19. O.C.G.A. § 36-66-3(4)(A) (2017); RCG Props., LLC v. City of Atlanta Bd. of Zoning Adjustment, 260 Ga. App. 355, 361, 579 S.E.2d 782, 786 (2003) (quoting O.C.G.A. § 36-66-3(4) and Bentley v. Chastain, 242 Ga. 348, 349 n.3, 249 S.E.2d 38, 39 n.3 (1978)).

20. O.C.G.A. § 36-66-3(4)(C) (2017).

21. O.C.G.A. §§ 36-66-1–6 (2017).

> The adoption of an amendment to a zoning ordinance which rezones property from one zoning classification to another;
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> The adoption of an amendment to a zoning ordinance by a municipal local government which zones property to be annexed into the municipality; or
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> The grant of a permit relating to a special use of property.[22]

The local government must follow procedures set forth in the ZPL under section 36-66-4[23] of the Official Code of Georgia Annotated (O.C.G.A.) as it considers each of these five legislative zoning decisions.[24] Local governments cannot delegate zoning power,[25] and an inferior board cannot make a zoning decision.[26]

In contrast, approval of a variance does not amend the local government's zoning ordinance, and it is not a legislative act.[27] A variance application does not seek rezoning, nor does approval change the land uses permitted within the zoning district.[28] The variance application asserts that strict application (usually of zoning district development criteria, such as lot width, road frontage, and setbacks) causes a hardship to property's reasonable economic development.[29] The variance application asks the local government to modify the zoning district's development requirements in a very limited case, specific only to the parcel identified in the variance application.[30] Since a variance is not a zoning decision, the local government may delegate authority to approve a variance to an inferior board, such as a Board of Zoning Appeals, as in *Cumming*.[31] The variance applicant must prove that compliance with the zoning district's development criteria imposes a hardship on the property.[32] The variance application is reviewed in light

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22. O.C.G.A. § 36-66-3(4) (2017).

23. O.C.G.A. § 36-66-4 (2017).

24. *Id.*

25. *E.g.*, Button Gwinnett Landfill, Inc. v. Gwinnett Cty., 256 Ga. 818, 820, 353 S.E.2d 328, 330 (1987).

26. *See id.* at 819, 353 S.E.2d at 330 (quoting Humthlett v. Reeves, 212 Ga. 8, 13, 90 S.E.2d 14, 18 (1955)).

27. *See Cumming*, 300 Ga. App. at 823, 797 S.E.2d at 850; *RCG Props.*, 260 Ga. App. at 361, 579 S.E.2d at 787.

28. ARDEN H. RATHKOPF ET AL., 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 58:1 (4th ed. 2015).

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.*

of criteria set forth in the zoning ordinance for variance approval.[33] Therefore, consideration of a variance application is a quasi-judicial, not legislative act.[34]

Historically, the zoning ordinance sets forth the procedures and time limits for filing a challenge to a land use decision. It has long been accepted procedure to challenge a land use decision by following the procedures set forth in the zoning ordinance.[35] Appeal directives in a zoning ordinance generally state that an aggrieved party may appeal a final action to the county superior court within thirty days of the date on which the action was taken.[36]

In the early 1990s, some zoning ordinances were amended to require that challenges to some land use decisions proceed to superior court by writ of certiorari.[37] The writ process was usually applied to challenge a variance decision. Text requiring appeal by writ of certiorari usually stated:

> The decision of the Board of Zoning Appeals is a final decision; therefore, any appeal of such a decision shall be pursued by application for writ of certiorari filed with the Superior Court of Fulton County within 30 days of the date of the decision.[38]

Writ procedures were immediately challenged when first introduced. In *Jackson v. Spalding County*,[39] the Georgia Supreme Court upheld the provision of a zoning ordinance that required a challenge to the denial of a variance to proceed by writ of certiorari.[40] The court affirmed that the local government had the authority to set forth the method of appeal in its zoning ordinance.[41]

The remedy sought when challenging a land use decision also impacts the procedure used. Very often, a land use decision challenge will include

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33. *Id.*

34. *See, e.g.*, *Cumming*, 300 Ga. at 820, 797 S.E.2d at 848; *RCG Props.*, 260 Ga. App. at 361, 579 S.E.2d at 787; *Button Gwinnett Landfill, Inc.*, 256 Ga. at 819, 353 S.E.2d at 330.

35. *See Cumming*, 300 Ga. at 822–23, 797 S.E.2d at 850 (discussing the local ordinance requirements).

36. *E.g.*, SPALDING COUNTY, CODE OF ORDINANCES app. IV (the Zoning Ordinance) § 418 & app. C.

37. *See Cumming*, 300 Ga. at 822, 797 S.E.2d at 850; Shockley v. Fayette Cty., 260 Ga. 489, 490–91, 396 S.E.2d 883, 884 (1990); Jackson v. Spalding Cty., 265 Ga. 792, 792, 462 S.E.2d 361, 362 (1995).

38. *E.g.*, FULTON COUNTY, CODE OF ORDINANCES pt. II, app. B, art. 22, § 22.13.

39. 265 Ga. 792, 462 S.E.2d 361 (1995), *overruled by Cumming*, 300 Ga. at 820, 797 S.E.2d at 848 (stating "We disapprove of cases . . . the leading one being Jackson.").

40. *Jackson*, 265 Ga. at 793, 462 S.E.2d at 362–63.

41. *Id.* at 795, 462 S.E.2d at 364–65.

a petition for a writ of mandamus. Mandamus is appropriate when an official duty has not been "faithfully performed."[42] A mandamus is often linked to a land use challenge because a permit application has been tendered (and probably denied) for a land use that the property owner contends is authorized as a matter of right. Mandamus is a remedy if a building official has wrongfully denied a permit for a use that is permitted in the zoning district.[43] As a litigation strategy, a rezoning application may be accompanied with a development permit application to test its denial by the building official. Mandamus would not be available in a variance or special use permit because the applicant has no clear legal right to the permit.[44] However, the mandamus action is totally separate and independent from an action challenging rezoning denial, even though it may arise from the same set of facts.[45]

With this background, the significance of *Cumming* is apparent. The Georgia Supreme Court overruled *Jackson* in *Cumming*.[46] However, the scope of the decision in *Cumming* is problematic. Did the decision narrowly hold that the proper way to challenge a variance decision is only by writ of certiorari when no method is set forth in the zoning ordinance? Or did *Cumming* go much further and broadly eliminate the legality of (what the court dubbed) the "local-ordinance requirement"—in other words, that a zoning ordinance sets forth the procedures by which all local government land use decisions, including zoning decisions, may be appealed?

If the court's decision in *Cumming* is narrowly applied, it was unnecessary for the court to overrule *Jackson*. *Jackson* is the leading case holding that a variance decision was quasi-judicial and should therefore be appealed by means of writ of certiorari pursuant to O.C.G.A. § 5-4-1[47] if that method was directed by the zoning ordinance.[48] The court in

42. O.C.G.A. § 9-6-20 (2017).

43. *E.g.*, DeKalb Cty. v. Publix Super Mkts., Inc., 264 Ga. 739, 741, 452 S.E.2d 471, 472 (1994).

44. *See, e.g.*, Riley v. S. LNG, Inc., 300 Ga. 689, 691, 797 S.E.2d 878, 880–81 (2017).

45. *See id.*

46. The first cases that announced the local-ordinance requirement involved a special use permit, not a zoning variance. City of Atlanta v. Wansley Moving & Storage Co., 245 Ga. 794, 795, 267 S.E.2d 234, 235–36 (1980) (stating "Judicial review of the denial of conditional use permits has traditionally been by way of mandamus . . . .We find no reason to treat special use permits differently from conditional use permits insofar as the means of judicial review is concerned."). However, other cases also decided before *Jackson* involving a zoning variance came to the same conclusion: the local-ordinance requirement controls. *E.g.*, *Shockley*, 260 Ga. at 490–91, 396 S.E.2d at 884.

47. O.C.G.A. § 5-4-1 (2017).

48. *Jackson*, 265 Ga. at 793, 462 S.E.2d at 363.

*Jackson* also stated that a variance decision may be appealed by writ of mandamus "[w]hen the zoning ordinance fails to prescribe a method of judicial review."[49]

In both *Cumming* and *Jackson* the court found that the City's decision to approve the variance was quasi-judicial.[50] In fact, the City's ordinance characterized variance decisions as "administrative or quasi-judicial," and directed BZA to do the following: (1) "consider whether the facts applying to a specific piece of property warrant relief from zoning under the standards set in the [local] ordinance;'" (2) "'determine[ ] the facts and appl[y] the ordinance's legal standards to them,' which is a 'decision-making process. . . akin to a judicial act;'" (3) "hold a hearing that is open to the public;" (4) give notice of the hearing to the aggrieved party; and (5) "inform all parties of its decision in writing within a reasonable time."[51] In fact, BZA took public comment at both variance hearings.[52] The courts in both *Jackson* and *Cumming* held that a variance decision is quasi-judicial and properly challenged by writ of certiorari to the superior court pursuant to O.C.G.A § 5-4-1.[53]

If *Cumming* reached the same conclusion as *Jackson*, why does it represent such a significant change in zoning law? The reason is the court implemented a new rule governing land use decisions holding that a zoning ordinance cannot direct the method of the challenge.[54] The court rejected the local-ordinance requirement regardless of whether the local ordinance provided for challenge by means of writ of certiorari.[55] To support its rejection of the local-ordinance requirement, the court, as in *Jackson*, first had to analyze whether a variance decision is a quasi-judicial decision.[56] This analysis was required because it has long been held that a writ of certiorari is not an available remedy for review of a decision of an inferior judiciary or body "rendered in the exercise of legislative, executive, or ministerial functions."[57] In *Cumming*, the court acknowledged the precedent that if the City's action were not quasi-

49. *Id.*

50. *Id.* at 794, 462 S.E.2d at 363–64; *Cumming*, 300 Ga. at 823, 797 S.E.2d at 850.

51. *Cumming*, 300 Ga. at 823–25, 797 S.E.2d at 850–52 (alterations in original) (quoting *Jackson*, 265 Ga. at 793–94, 462 S.E.2d at 363–64).

52. *Id.* at 821, 797 S.E.2d at 849.

53. *Id.* at 822, 797 S.E.2d at 850; *Jackson*, 265 Ga. at 793–94, 462 S.E.2d at 363.

54. *Cumming*, 300 Ga. at 826, 797 S.E.2d at 852.

55. *Id.* at 822, 797 S.E.2d at 850.

56. *Id.* at 823, 797 S.E.2d at 850.

57. *Id.* (quoting Presnell v. McCollum, 112 Ga. App. 579, 579, 145 S.E.2d 770, 770 (1965)).

judicial, *Jackson* would not apply, and a petition for certiorari could, therefore, not be used to challenge the variance decision.[58]

However, the court in *Cumming* went further to hold that the local-ordinance requirement is invalid even if it directed a challenge to a quasi-judicial land use decision to proceed by writ of certiorari.[59] The court stated:

> The most troubling consequence of the local-ordinance requirement is that it allows local ordinances to effectively preempt the general certiorari statute. According to *Jackson*, the local ordinance rather than O.C.G.A. § 5-4-1 determines how a variance decision must be appealed; in fact, a city or county may turn the state statute off or on simply by amending its ordinance. This scheme does not comport with our Constitution, under which general laws are supreme over local ordinances, including in the field of zoning.[60]

Ultimately, the court totally rejected the local-ordinance requirement, and went to great lengths to demonstrate its rejection was right and logical.[61]

The court analyzed whether the following factors of stare decisis supported rejection of the local-ordinance requirement: (1) the soundness of the precedent's reasoning; (2) the age of the precedent; (3) the reliance the precedent has induced; and (4) the precedent's workability.[62] The majority of the court's analysis focused on the age of the precedent. Finding that the local-ordinance requirement conflicts with O.C.G.A § 5-4-1, as well as other precedents thereunder in non-zoning related cases,[63] the court noted that the Georgia Code has contained a statute analogous to O.C.G.A. § 5-4-1 since 1860, allowing appeals of judicial and quasi-judicial decisions of local governments to be brought by writ of certiorari.[64] The court reasoned that the local-ordinance requirement gave "no justification for creating an exception."[65]

Next, the court noted that when *Jackson* was decided, there was uncertainty regarding whether a variance decision constituted "a decision 'by [an] inferior judiciary or [a] person exercising judicial

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58. *Id.*

59. *Id.* at 832–33, 797 S.E.2d at 856.

60. *Id.* at 829, 797 S.E.2d at 854.

61. *Id.* at 826–32, 797 S.E.2d at 852–56.

62. *Id.* at 826, 797 S.E.2d at 852, 856 (quoting Woodard v. State, 296 Ga. 803, 812, 771 S.E.2d 362, 369 (2015)).

63. *Id.* at 826, 797 S.E.2d at 852.

64. *Id.* at 826–27, 797 S.E.2d at 852.

65. *Id.* at 827, 797 S.E.2d at 853.

powers.'"[66] The court noted its own conflicting precedent, sometimes holding that mandamus was the proper way to challenge a variance and conditional or special use permit decision without considering whether the decision was quasi-judicial or if certiorari was also available,[67] and other times holding that certiorari was not available because the underlying decision was not quasi-judicial or judicial.[68] The court noted that one decision held that a decision on a conditional use permit could be appealed via a writ of certiorari,[69] and another "suggested that variance decisions may be quasi-judicial."[70] While later cases such as *Dougherty County v. Webb*[71] found that some zoning decisions were quasi-judicial, they continued to endorse the local-ordinance requirement.[72] The court in *Cumming* said that the decision in *Jackson* "eliminated the uncertainty that had generated the local-ordinance requirement, [but] it preserved the requirement without explanation and apparently without recognizing the inconsistency."[73] For that reason, the court refused to "perpetuate that analytical error."[74]

The court's biggest grievance with the local-ordinance requirement was "that it allow[ed] local ordinances to effectively preempt" O.C.G.A. § 5-4-1.[75] Thus, it held that the local-ordinance requirement violates constitutional notions of preemption under which local ordinances must succumb to general statutes.[76] The court stated that it had already taken

66. *Id.* (alterations in original) (quoting O.C.G.A. § 5-4-1).

67. *Id.* at 827–28, 797 S.E.2d at 853 (citing *Wansley Moving & Storage Co.*, 245 Ga. at 795, 267 S.E.2d at 235 (holding that a special use permit decision was a judicial decision); and then citing Pruitt v. Meeks, 226 Ga. 661, 662, 177 S.E.2d 41, 43 (1970) (holding the same for a conditional use permit)).

68. *Id.* (citing Int'l Funeral Servs., Inc. v. Dekalb Cty., 244 Ga. 707, 709, 261 S.E.2d 625, 627–28 (1979) (holding that a variance decision was "not a [quasi-]judicial" decision); and then citing Manning v. A.A.B. Corp., 223 Ga. 111, 115, 153 S.E.3d 561, 564–65 (1967) (holding same for a conditional use permit)).

69. *Id.* at 828, 797 S.E.2d at 853 (citing *Jackson*, 265 Ga. at 793–94, 462 S.E.2d at 363).

70. *Id.* (citing *Bentley*, 242 Ga. at 348 n.4, 249 S.E.2d at 39 n.4).

71. 256 Ga. 474, 350 S.E.2d 457 (1986), *overruled by Cumming*, 300 Ga. at 831, 797 S.E.2d at 855 (stating "We now formally disapprove of Webb.").

72. *Cumming*, 300 Ga. at 828–29, 797 S.E.2d at 854 (citing *Wansley Moving & Storage Co.*, 245 Ga. at 795, 267 S.E.2d at 235 (holding that a special use permit decision was a judicial decision); and then citing *Pruitt*, 226 Ga. at 662, 177 S.E.2d at 43 (holding the same for a conditional use permit)).

73. *Id.* at 829, 797 S.E.2d at 854.

74. *Id.*

75. *Id.*

76. *Id.* at 828–29 n.7, 797 S.E.2d at 853–54 n.7 (citing GA. CONST. art. III, § 7, para. 4(a) (providing "Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law

steps to correct the local-ordinance requirement by preventing a local government from creating a mechanism for a judicial appeal of its land use decisions, including a direct appeal.[77] Noting that *Jackson* was only twenty-one years old and was only cited "a handful of times" (without any additional supporting rationale), the age of the precedent posed no barrier to its rejection because it was "neither ancient nor entrenched."[78] Even though *Jackson* set precedent governing land use decision challenges, rejection of the local-ordinance requirement amounted to an "'issue . . . of appellate procedure, not contract, property, or other substantive rights in which anyone has a significant reliance interest.'"[79]

The court acknowledged that its decision in *Cumming* would result in dismissal of the neighbors' appeal with the consolation that it was not aware of any other pending appeals that would be dismissed, and that a pending appeal would only be dismissed if the following conditions were met: (1) it was brought by writ of mandamus rather than by writ of certiorari; (2) appealed from a quasi-judicial zoning decision; and (3) certiorari was not provided for by the local ordinance.[80] While the court found that the local-ordinance requirement "is not unworkable, it is not as workable as the correct rule"[81] because it is difficult to determine whether an ordinance provides for a writ of certiorari and what

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authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws."); then citing GA. CONST. art. IX, § 2, para. 1(a) (providing "The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution or any local law applicable thereto."); then citing GA. CONST. art. IX, § 2, para. 4 (providing "The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power.")).

77. *Id.* at 830–31, 797 S.E.2d at 855 (quoting Haralson Cty. v. Taylor Junkyard of Bremen, Inc., 291 Ga. 321, 323, 729 S.E.2d 357, 359 (2012); Walton Cty. v. Scenic Hills Estates, Inc., 261 Ga. 94, 94, 401 S.E.2d 513, 514 (1991)). To eliminate confusion in the jurisprudence, the court explicitly declared that it overruled all prior cases holding that a local government could provide for a direct appeal by ordinance. *Id.*

78. *Id.* at 831–32, 797 S.E.2d at 856 (quoting Southall v. State, 300 Ga. 462, 468, 796 S.E.2d 261, 267 (2017) (overruling forty-five-year-old precedent)).

79. *Id.* at 832, 797 S.E.2d at 856 (quoting *Southall*, 300 Ga. at 467, 796 S.E.2d at 267).

80. *Id.* at 832–33 n.8, 797 S.E.2d at 856 n.8.

81. *Id.* at 833, 797 S.E.2d at 856.

constitutes a quasi-judicial decision.[82] The local-ordinance requirement, consequently, could "pollute other streams of our law."[83]

Ultimately, the court used *Cumming* as the mechanism to void the local-ordinance requirement, declaring that "[b]ecause the local-ordinance requirement's 'reasoning is unsound and contrary to the body of our law,' the most important stare decisis factor weighs strongly in favor of disapproving the requirement."[84] In doing so, the court in *Cumming* made a significant new legal declaration regarding the procedure by which a challenge to a local government land use decision may be brought. After *Cumming,* the court stated that the appellate procedure for future appeals is now clear.[85] However, the decision in *Cumming* goes far beyond setting a procedure to challenge a local government's quasi-judicial land use decision, such as a variance, and its impact is far from clear.[86]

The most significant question raised by *Cumming* is whether its elimination of the local-ordinance requirement applies to legislative zoning decisions made by local governments, as well as quasi-judicial decisions, like variances. While *Cumming* acknowledges that certiorari is not an appropriate remedy to review a local government decision rendered in the exercise of legislative functions, its text suggests it applies broadly to zoning decisions as well.[87] In fact, some of the cases on which it relies involve zoning decisions—*Hollberg v. Spalding County*,[88] *Beugnot v. Coweta County*,[89] and *Walton County v. Scenic Hills Estates,*

82. *Id.* at 833, 797 S.E.2d at 856–57 (quoting section 113–120 of the City of Cumming's Zoning Ordinance which provides, "All decisions of the mayor and council or the board of zoning appeals are final and may be subject to appeal only by suit filed in the superior court of the county. In cases of legislative decisions (e.g., rezonings, conditional use permits, and text amendments), the review shall be de novo review. In cases of administrative or quasi-judicial decisions (e.g., variances), review shall be based upon the existing record."). In fact, the parties in *Cumming* fiercely argued over whether this section of Cumming's Zoning Ordinance authorizes judicial review by writ of certiorari. *Id.* at 833, 797 S.E.2d at 857. The court, however, did not analyze Sections 113–120 because it was moot. *Id.* at 833 n.9, 797 S.E.2d at 857 n.9 (stating "[g]iven our conclusion, we need not delve into which party is right on this point.").

83. *Id.* at 834, 797 S.E.2d at 857 (quoting State v. Jackson, 287 Ga. 646, 647, 697 S.E.2d 757, 758 (2010)).

84. *Id.* at 831, 797 S.E.2d at 852, 856 (quoting *State v. Jackson*, 287 Ga. at 658, 697 S.E.2d at 766).

85. *Id.* at 832–33, 797 S.E.2d at 856.

86. *See id.* at 832, 797 S.E.2d at 855.

87. *See id.* at 830, 797 S.E.2d at 855.

88. 281 Ga. App. 768, 637 S.E.2d 163 (2006).

89. 231 Ga. App. 715, 500 S.E.2d 28 (1998).

*Inc.*[90] all involve rezoning actions. The court also quoted *Stendahl v. Cobb County*[91] for the proposition that "the General Assembly has not provided a statutory mechanism for the direct appeal to superior court of the *zoning decisions* of local governing authorities."[92]

Additionally, the court did not even mention the definitions of "zoning decisions" in the *Cumming* opinion.[93] Under the ZPL,[94] the State has identified five "zoning decisions" that are "final *legislative* action[s]."[95] The State deemed each of these five zoning decisions to be legislative actions by statute, to which the holding in *Cumming* should have no application. However, *Cumming* states (without limitation) "[i]n short, the local ordinance's control over the procedures that apply to the case ends when the case leaves the local government for the superior court."[96] This certainly suggests that the court intended for the elimination of the local-ordinance requirement in *Cumming* to apply to more land use decisions than variances.[97]

The application of *Cumming* to a special use permit zoning decision is the most contradictory part of the holding. Arguably, "[t]he grant of a permit relating to a special use of property"[98] is the hybrid in the ZPL's definition of a zoning decision, and it is the most difficult to reconcile with *Cumming*. A permit relating to a special use of property[99] (in other words, a special use permit, a special exception, or a conditional use permit), looks quasi-judicial, like a variance.[100] But, a special use permit is a zoning decision under the ZPL.[101] The court in *Cumming* did not mention the ZPL when it stated the following in a footnote:

> Special and conditional use permits "involve a special use authorized by the existing zoning ordinance (e.g., airports, cemeteries, drive-in theaters, mobile home and trailer parks, quarries) but the ordinance provides that such uses shall be allowed only upon the condition that

90. 261 Ga. 94, 401 S.E.2d 513 (1991).

91. 284 Ga. 525, 668 S.E.2d 723 (2008).

92. *Cumming*, 300 Ga. at 831, 797 S.E.2d at 855 (emphasis added) (quoting *Stendahl*, 284 Ga. at 526, 668 S.E.2d at 726).

93. *See Cumming*, 300 Ga. 820, 797 S.E.2d 846.

94. *See supra* text accompanying notes 21–22.

95. O.C.G.A. § 36-66-3 (2017) (emphasis added).

96. *Cumming*, 300 Ga. at 831, 797 S.E.2d at 856.

97. *See generally id.*

98. O.C.G.A. § 36-66-3(4)(E) (2017).

99. *Id.*

100. RATHKOPF, *supra* note 28, § 58:3.

101. O.C.G.A. § 36-66-3(4)(E).

> it be approved by the appropriate governmental body."[102] Variance requests are similar, except that the nonconforming use requested is not explicitly provided for in the zoning ordinance, and the zoning authority must "consider[] whether the facts applying to a specific piece of property warrant relief from zoning under the standards set in the county ordinance."[103]

In the same footnote, the court stated,

> [a]lthough the City and [the developer] point to this distinction as a reason to abandon the local-ordinance requirement, it is not clear that conditional and special use permit cases are meaningfully different from variance cases in this context, 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 conditional or special use request.[104]

If (in the court's view) there is no meaningful difference between a variance and a special use permit, the holding in *Cumming* that eliminates the local-ordinance requirement and governs the required procedure for a land use decision challenge would apply to a special use permit—even though the ZPL designates a special use permit as a legislative act. This renders *Cumming* inherently self-contradictory. If *Cumming* applies to all land use challenges, legislative zoning decisions as well as quasi-judicial variances, either the court or the Georgia General Assembly will have to reconcile *Cumming* with the ZPL.[105] Most likely, the court will soon confront a factual scenario in which a lower court applies *Cumming* to a rezoning or other legislative zoning decision listed in the ZPL and the losing party appeals.

As it now stands, the ZPL and *Cumming* are in direct conflict unless the holding in *Cumming* is expressly limited to a variance challenge. However, the conflict (or possibly more-appropriately described—confusion) existed even before *Cumming*. The Georgia Court of Appeals decided *Bulloch County Board of Commissioners v. Williams*[106] during the survey period and held that when "a special permit is sought under terms set out in the local ordinance, the local governing body 'acts in a quasi-judicial capacity to determine the facts and apply the law,'"[107] but

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102. *Cumming*, 300 Ga. at 828 n.5, 797 S.E.2d at 853 n.5 (quoting *Wansley Moving & Storage Co.*, 245 Ga. at 794, 267 S.E.2d at 234).

103. *Id.* (alteration in original) (quoting *Jackson*, 265 Ga. at 793, 432 S.E.2d at 361).

104. *Id.*

105. *See supra* text accompanying notes 21–22.

106. 332 Ga. App. 815, 773 S.E.2d 37 (2015).

107. *Id.* at 817, 773 S.E.2d at 39 (quoting *Webb*, 256 Ga. at 478 n.3, 350 S.E.2d at 460 n.3).

made no reference to the designation of a special use permit as a zoning decision under the ZPL.[108]

The *Cumming* decision creates a number of pitfalls for practitioners. While *Cumming* makes it clear that a land use challenge involving a variance must proceed by writ of certiorari, no other challenge procedure is clear.[109] Counsel for a party challenging a land use decision must decide how *Cumming* applies, if it does. The problem is obvious: if the land use challenge does not follow correct procedure, it will be dismissed long after the time for pursuing an alternative challenge process has passed. Will *Cumming* require prudent counsel to file both a direct appeal and a writ of certiorari when in doubt of application of the local government's ordinance and irrespective of whether the land use is a legislative zoning decision under ZPL?[110] Must land use practitioners now become versed in writs of certiorari and related procedures, such as O.C.G.A. § 5-4-3[111] which sets the procedural requirements for filing a writ of certiorari? Specifically, O.C.G.A. § 5-4-3 provides as follows:

> When either party in any case in any inferior judicatory or before any person exercising judicial powers is dissatisfied with the decision or judgment in the case, the party may apply for and obtain a writ of certiorari by petition to the superior court for the county in which the case was tried, in which petition he shall plainly and distinctly set forth the errors complained of. On the filing of the petition in the office of the clerk of the superior court, with the sanction of the appropriate judge endorsed thereon, together with the bond or affidavit, as provided in OCGA § 5-4-5, it shall be the duty of the clerk to issue a writ of certiorari, directed to the tribunal or person whose decision or judgment is the subject matter of complaint, requiring the tribunal or person to certify and send up all the proceedings in the case to the superior court, as directed in the writ of certiorari.[112]

Even if a writ of mandamus is the appropriate remedy to challenge the wrongful denial of a permit, must the challenge proceed by writ of certiorari because of the permit's connection and nexus to a zoning decision? The reality is that no one, including the court in *Cumming*, knows. It will take litigants several years and the financial wherewithal

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108. *See Williams*, 332 Ga. App. at 815, 773 S.E.2d at 37.

109. *See Cumming*, 300 Ga. at 820, 797 S.E.2d at 848.

110. A related issue arose just outside the survey period in *Schumacher* regarding appeals from a trial courts' decisions on zoning related matters. *Schumacher*, 301 Ga. 635, 803 S.E.2d 66.

111. O.C.G.A. § 5-4-3 (2017).

112. *Id.*

to flesh out the extent of the holding of *Cumming*. The path forward for local government and land use attorneys is certainly unclear.

After *Cumming*, *City of Dunwoody v. Discovery Practice Management, Inc.*,[113] has new implications. Decided before *Cumming*, *Discovery* held that the renewal provision of O.C.G.A § 9-2-61(a)[114] applies to writ of certiorari cases.[115] In *Dunwoody*, the city planner for the City of Dunwoody (the City) issued a letter to Discovery Practice Management, Inc. (Discovery) that classified Discovery's proposed use of the subject property as a "family personal care home" and stated that it was permitted as a matter of right in the zoning district applicable to the subject property. Three months later, neighbors of the subject property filed an "application for administrative appeal" with the City's Zoning Board of Appeals (the ZBA), though the City's zoning ordinance required an appeal to be filed in thirty days.[116] The ZBA accepted the appeal and held hearings thereon. Agreeing with the neighbors, the ZBA concluded that Discovery's intended use constituted a "medical treatment facility," a use not permitted in the zoning district. The ZBA also found, at the neighbors' insistence, that the City's zoning ordinance contained an implicit requirement that the City must give notice to the neighbors of a planner's determination.[117]

Discovery filed a writ of certiorari to appeal the ZBA's determination. In that case, Discovery perfected service on the City, the defendant-in-certiorari, but did not serve the ZBA, the respondent-in-certiorari. After filing the original petition for writ of certiorari, Discovery voluntarily dismissed the petition and refiled within six months thereafter.[118] The City then filed a motion to dismiss arguing that the refiled petition was void *ab initio*[119] because the original and the renewed writ of certiorari were never served on the ZBA pursuant to O.C.G.A § 5-4-6(b),[120] which provides as follows:

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113. 338 Ga. App. 135, 789 S.E.2d 386 (2016).

114. O.C.G.A. § 9-2-61(a) (2017).

115. *Dunwoody*, 338 Ga. App. at 135, 789 S.E.2d at 387–88.

116. *Id.* at 137–38, 789 S.E.2d at 389.

117. *Id.* at 139, 789 S.E.2d at 390. The Dunwoody zoning ordinance provided that appeals from a city planner's decision must be made within thirty days. At the ZBA's hearing, the neighbors argued that they were unaware of this provision and that this provision would violate due process if the ZBA did not read a notice requirement into the ordinance. *Id.* at 138–39, 789 S.E.2d at 390.

118. *Id.* at 135–36, 789 S.E.2d at 337.

119. In other words, invalid from the outset. *Id.*

120. O.C.G.A. § 5-4-6(b) (2017).

> The certiorari petition and writ shall be filed in the clerk's office within a reasonable time after sanction by the superior court judge; and a copy shall be served on the respondent, within five days after such filing, by the sheriff or his deputy or by the petitioner or his attorney. A copy of the petition and writ shall also be served on the opposite party or his counsel or other legal representative, in person or by mail; and service shall be shown by acknowledgment or by certificate of the counsel or person perfecting the service.[121]

This statutory provision has been construed to require personal service on the respondent-in-certiorari, here, the ZBA.[122]

Upholding the trial court's ruling, the Georgia Court of Appeals held that failure to perfect service of the petition and writ on the local government entity or officer whose decision is under review (the *respondent-in-certiorari*) is a mere irregularity curable by either a waiver evidenced by the filing of the answer, or by the trial court's extension of time to perfect service.[123] Therefore, since the error was curable, the underlying decision was voidable, not void.[124] The trial court did not err in denying the City's motion to dismiss.[125] On this point, however, the *Discovery* opinion was distinguished by *City of Sandy Springs Board of Appeals v. Traton Homes, LLC*.[126]

The trial court also held that ZBA erred in accepting the neighbors' untimely appeal and in reading a notice requirement into the ordinance that did not otherwise exist.[127] The court upheld the trial court on both of these issues.[128] The neighbors' appeal was clearly untimely under the

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121. *Id.*

122. *Dunwoody*, 338 Ga. App. at 136 n.1, 789 S.E.2d at 388 n.1.

123. *Id.* at 136–37, 789 S.E.2d at 388 (quoting Bass v. City of Milledgeville, 121 Ga. 151, 153, 48 S.E. 919, 920 (1904)).

124. *Id.* at 137, 789 S.E.2d at 388.

125. *Id.* at 137, 789 S.E.2d at 388–89.

126. 341 Ga. App. 551, 801 S.E.2d 599 (2017). Four days after the end of the survey period, and while this Article was being drafted, the Georgia Court of Appeals decided *City of Sandy Springs Board of Appeals v. Traton Homes, LLC*, which distinguished *Dunwoody* by holding that failure to serve the *defendant-in-certiorari*, in other words, the local government, the City of Sandy Springs, is a curable defect, but it is not when the local government, as the properly opposing party, is not a named party to the suit. *Id.* at 558, 801 S.E.2d at 605. *Sandy Springs* also clarified that, contrary to the treatment of the petition and writ of certiorari in *Dunwoody*, "the petition for certiorari filed by the dissatisfied party, the writ of certiorari issued by the superior court clerk, and the sanction by the superior court judge are separate entities." *Id.* at 554, 801 S.E.2d at 603.

127. *Dunwoody*, 338 Ga. App. at 138, 789 S.E.2d at 389.

128. *Id.* at 140, 789 S.E.2d at 390.

City's ordinance.[129] Additionally, the neighbors were not entitled to notice because due process, which "includes the right to notice and an opportunity to be heard," extends only to proceedings "at which a party may be deprived of life, liberty, or property."[130] As a result, the court summarily declared that "[d]ue process rights were not triggered" here; "a use by right [is] not something that requires notification."[131] However, the court noted that the neighbors could obtain declaratory or injunctive relief against Discovery if it were to continue to use its property in contravention of the City's zoning ordinance.[132]

The trial court also reversed the ZBA decision that concluded the initial classification by the City's planner was erroneous.[133] Thus, the trial court reinstated the "family personal care home" classification.[134] Also on appeal, the City alleged the trial court erred in denying its motion to dismiss Discovery's renewed writ of certiorari filed pursuant to O.C.G.A. §§ 5-4-3 and 9-2-61(a).[135] Section 9-2-61(a) of the O.C.G.A. (the "renewal provision") provides as follows:

> When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of OCGA § 9-11-41;[136] provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.[137]

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129. Under *Cumming,* does the local-ordinance requirement, which specifies a time for bringing a challenge, still apply since O.C.G.A. § 5-4-6 specifies a deadline for filing a writ of certiorari?

130. *Dunwoody,* 338 Ga. App. at 139–40, 789 S.E.2d at 390.

131. *Id.* at 140, 789 S.E.2d at 390–91 (quoting the city planner at one of the ZBA hearings).

132. *Id.* at 140–41, 789 S.E.2d at 391.

133. *Id.* at 135, 789 S.E.2d at 387.

134. *Id.*

135. *Id.*

136. O.C.G.A. § 9-11-41(d) provides as follows: "[i]f a plaintiff who has dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the plaintiff shall first pay the court costs of the action previously dismissed." O.C.G.A. § 9-11-41(d) (2017).

137. O.C.G.A. § 9-2-61(a) (2017).

Citing *Buckler v. DeKalb County*,[138] the court of appeals reiterated that the renewal provision allows a case commenced within the statute of limitation to be dismissed and recommenced within six months of dismissal, even if the statute of limitations passes during the interim.[139] Nonetheless, the renewal provision does not apply to cases that were void when dismissed or that were dismissed on the merits; it does, however, apply if the case was merely voidable when dismissed.[140] Moreover, "'the renewal provisions . . . apply to [writ of] certiorari cases brought pursuant to OCGA § 5-4-1 et seq.'"[141] In light of *Cumming* and *Dunwoody*, appeals of a quasi-judicial zoning decision by writ of certiorari are subject to the renewal statute, but only if the case was not void when dismissed.[142]

## II. FACIAL CONSTITUTIONAL CHALLENGE DOES NOT REQUIRE EXHAUSTION OF REMEDIES

In *Elbert County v. Sweet City Landfill, LLC*,[143] the Georgia Supreme Court reiterated that exhaustion of remedies is not required when an ordinance is constitutionally challenged on its face. The court held that O.C.G.A. 5-3-20[144]—which requires an appeal to a superior court to "be filed within 30 days of the date the judgment, order, or decision complained of was entered"—did not apply to an Elbert County Board of Commissioners vote.[145] Summarizing the Dormant Commerce Clause[146] jurisprudence of the Supreme Court of the United States, the court held that the trial court erred in failing to apply the balancing test announced in *Pike v. Bruce Church, Inc.*[147] to the "ordinance [that did] not, on its face, discriminate against interstate commerce."[148]

Elbert County's Solid Waste Ordinance (the SW Ordinance), in effect when the facts of the case arose, required a Special Use Permit for operation of a solid waste landfill. Sweet City Landfill, LLC (Sweet City) submitted an "Application"[149] that requested "a Special Use Permit and

138. 290 Ga. App. 190, 659 S.E.2d 398 (2008).

139. *Dunwoody*, 338 Ga. App. at 136, 789 S.E.2d at 387–88 (quoting *Buckler*, 290 Ga. App. at 191, 659 S.E.2d at 399).

140. *Id.*

141. *Id.*

142. *See generally id.*

143. 297 Ga. 429, 774 S.E.2d 658 (2015).

144. O.C.G.A. § 5-3-20 (2017).

145. *Sweet City Landfill*, 297 Ga. at 432, 434, 774 S.E.2d at 662, 664.

146. U.S. CONST. art. I, § 8, cl. 3.

147. 397 U.S. 137 (1970).

148. *Sweet City Landfill*, 297 Ga. at 435, 774 S.E.2d at 664.

149. *Id.* at 429, 774 S.E.2d at 661. The document was entitled "Application and Agreed Minimum Operating Conditions." *Id.*

a zoning estoppel letter and a certificate of solid waste plan consistency be simultaneously issued."[150] At the time Sweet City submitted its Application, Elbert County (the County) was in the process of amending the Ordinance to exempt "waste to energy" solid waste facilities[151] that met the O.C.G.A. § 12-8-22(41)[152] definition thereof.[153] Sweet City amended its Application to qualify as a waste to energy facility. After the County approved a waste to energy landfill proposal from another developer, Sweet City filed suit twice. In October 2011, the County and Sweet City entered into a "tolling agreement" that placed the parties' legal disputes in abeyance during negotiations related to the Application.[154]

Less than a month later, the County amended its ordinance to remove the waste to energy exception. At Sweet City's request, the "discussion and consideration [of] siting of a proposed solid waste facility and the associated proposed host agreement" was placed on the next meeting agenda of the Elbert County Board of Commissioners at which the Board voted unanimously "not to enter into a 'Host Agreement' with [Sweet City], and . . . to terminate the tolling agreement."[155] Over eight months later, Sweet City filed a "Verified Complaint for Declaratory Judgment, and Injunctive Relief" alleging, among other things, that the Ordinance was unconstitutional.[156] The County moved to dismiss the complaint; Sweet City moved for summary judgment. The trial court granted Sweet City's motion for summary judgment and denied the County's motion to dismiss.[157]

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150. *Id.*

151. *Id.* The ordinance tied the definition of a "waste to energy facility" to that in O.C.G.A. § 12-8-22(41) which provides that "'[w]aste to energy facility' means a solid waste handling facility that provides for the extraction and utilization of energy from municipal solid waste through a process of combustion." O.C.G.A. § 12-8-22(41) (2017).

152. O.C.G.A. § 12-8-22(41).

153. *Sweet City Landfill*, 297 Ga. at 430, 774 S.E.2d at 661.

154. *Id.*

155. *Id.* at 430, 774 S.E.2d at 661 (alteration in original).

156. *Id.* at 430–31, 774 S.E.2d at 661. Sweet City also alleged that it "had a vested right to develop the subject property as a waste disposal facility" and "sought a mandatory injunction allowing it to proceed with the landfill." *Id.*

157. *Id.* at 431, 774 S.E.2d at 661–62. In doing so, the trial court granted a temporary injunction barring the County from enforcing or enacting any ordinances to interfere with Sweet City's development and held the following: (1) the Ordinance violated the Commerce Clause; (2) that the Board's action deprived Sweet City of equal protection under both the Georgia and United States Constitutions; (3) Sweet City had a vested right to have a letter of zoning and development consistency an compliance; and (4) Sweet City had a vested right to develop the property as a landfill free of any zoning and land use restrictions. *Id.*

The County appealed, contending first that Sweet City was required to appeal within thirty days of the Board's vote pursuant to O.C.G.A. § 5-3-20.[158] The court reasoned that the issue before the Board "was essentially a framework of how a host agreement *would* be prepared," and the Board voted to refrain from pursuing that framework.[159] At no time did this framework refer to the Application.[160] Accordingly, the court held that the Board took no action on Sweet City's Application, and the Board's vote was not a "decision" within the meaning of O.C.G.A. § 5-3-20.[161] Irrespective of *Elbert County*, prudent practitioners should assume that appeals from local government actions related to land use should be taken within thirty days of the action pursuant to O.C.G.A. § 5-3-20, particularly when claims other than a facial constitutional challenge are available.[162]

Next, the court addressed exhaustion of administrative remedies[163] and held that the trial court erroneously rejected the County's argument that this requirement mandated dismissal and, instead, applied the futility exception.[164] However, the Board never voted on Sweet City's Special Use Permit; therefore, Sweet City could not establish the crux of the futility exception—that additional administrative review would result in the same body rendering a decision on the same issue.[165] Additionally, the trial court erroneously decided in favor of Sweet City on the merits of its vested rights and equal protection claims (based on the County's treatment of the other waste to energy landfill) because the court only addressed vested rights claims after the local government has refused to issue the necessary permits for a proposed project or has

158. *Id.* at 431, 774 S.E.2d at 662.

159. *Id.* at 432, 774 S.E.2d at 662.

160. *Id.*

161. *Id.* However, the court did hold that the trial court erred in asserting that Sweet City was not required to appeal because the Board's vote occurred without public notice as required by O.C.G.A. § 12-8-26(b) and the Elbert County Code of Ordinances. *Id.* A void judgment does not make an appeal unnecessary, instead, "an appeal of a void judgment will result in a reversal and provide redress from an illegal judgment." *Sweet City Landfill,* 297 Ga. at 432–33, 774 S.E.2d at 662–63.

162. *See Sweet City Landfill,* 297 Ga. at 432–33, 774 S.E.2d at 662–63.

163. "[T]he general rule [of exhaustion of remedies] is that before a party seeks redress in the courts regarding the application of local regulation to property, it must apply to the local authorities for determination of [the] matter." *Id.* at 433, 774 S.E.2d at 663 (quoting City of Suwanee v. Settles Bridge Farm, LLC, 292 Ga. 434, 437, 738 S.E.2d 597, 599–600 (2013)).

164. *Id.* The futility exception is "narrow" and applies when "the litigant establishes that submitting to the administrative process would be 'futile.'" *Id.* (quoting *Settles Bridge Farm, LLC*, 292 Ga. at 437, 738 S.E.2d at 600).

165. *Id.*

imposed unconstitutional restrictions on an existing project.[166] On exhaustion of administrative remedies, the trial court also erred in ordering Sweet City to return to the Board for a final "futile" decision.[167] The court reiterated that the exhaustion of administrative remedies requirement does not apply when the constitutionality of an ordinance is facially challenged.[168]

Addressing Sweet City's constitutional claim that the Ordinance violated the Dormant Commerce Clause,[169] the trial court also erred in its analysis.[170] The court reminded the bar that Supreme Court of the United States precedent holds laws which discriminate on their face in favor of in-state (as opposed to out-of-state) economic interests, and that are motivated by economic protectionism are *per se* invalid.[171] However, a facially non-discriminatory law must be analyzed under the balancing test set forth in *Pike*, by which it[172]

> will be upheld unless the burden [it] impose[s] on [interstate] commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[173]

Because the trial court did not engage in the *Pike* balancing test, the court remanded the case for the trial court to do so.[174]

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166. *Id.* (quoting Cooper v. Unified Gov't of Athens Clarke Cty., 277 Ga. 360, 362, 589 S.E.2d 105, 107 (2003)).

167. *Id.* at 434, 774 S.E.2d at 663–64.

168. *Id.* at 434, 774 S.E.2d at 663.

169. *Id.* at 434, 774 S.E.2d at 664. Specifically, Sweet City alleged, and produced uncontroverted evidence, that when the Ordinance's requirements—that all such facilities "be located on a State Highway, not create traffic through residential areas, be more than three miles from 'state waters' . . . be more than three miles from certain cultural and governmental sites, and be more than one mile from any residence or water supply well"—were applied, no suitable site existed in the County and, therefore, the Ordinance violated the Dormant Commerce Clause by hindering interstate commerce. *Id.*

170. *Id.* at 436, 774 S.E.2d at 664–65.

171. *Id.* at 435, 774 S.E.2d at 664 (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007)).

172. *Id.* In other words, an ordinance that "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." *Id.*

173. *Id.* (quoting *Pike*, 397 U.S. at 142).

174. *Id.* at 436, 774 S.E.2d at 665.

## III. A PERMISSIBLE ACCESSORY USE CAN TRANSFORM INTO AN IMPERMISSIBLE PRINCIPAL USE

In *Burton v. Glynn County*,[175] the Georgia Supreme Court held that a permissible accessory use of property in a zoning district can become so "sufficiently voluminous and mechanized" that it "move[s] beyond that expected or customary for" the zoning classification as to become an impermissible principal use, especially in single-family residential zoning districts.[176] A zoning ordinance is not unconstitutionally vague merely because it does not identify with mathematical precision the point at which a permissible accessory use is transformed into an impermissible principal use.[177] To satisfy due process, an ordinance "must 'be specific enough to give fair warning of the prohibited conduct'" or, in other words, "sufficiently specific for 'persons of common intelligence' to recognize that [a use] does not qualify as a permissible use in" the zoning district.[178]

In *Burton*, property owners built a "lavish home . . . known as Villas de Suenos," in a "low-to-medium density residential" zoning district located in the East Beach neighborhood of St. Simons Island. It was offered as a short-term vacation rental, a permissible use under the Glynn County Zoning Ordinance (the Ordinance). After neighbors complained, the Glynn County Community Development Director (the Director) concluded, upon investigating, that Villa de Suenos was being utilized as a "commercial event venue," [179] a use that was not permitted in the zoning district. The Director sent the owners of Villa de Suenos (the Owners) a cease and desist letter.[180]

The Owners then filed suit seeking declaratory and injunctive relief, a writ of mandamus, and writ of prohibition to prevent enforcement of the Ordinance. They also alleged that the enforcement of the Ordinance

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175. 297 Ga. 544, 776 S.E.2d 179 (2015).

176. *Id.* at 547–48, 776 S.E.2d at 183 (quoting Cawthon v. Douglas Cty., 248 Ga. 760, 765, 286 S.E.2d 30, 34 (1982)).

177. *Id.* at 548, 776 S.E.2d at 183.

178. *Id.* at 548–49, 776 S.E.2d at 183 (quoting 105 Floyd Road, Inc. v. Crisp Cty., 279 Ga. 345, 348, 613 S.E.2d 632, 634 (2005)).

179. *Id.* at 544–45, 776 S.E.2d at 181.

> [F]rom 2010 through May 2013, at least 79 events were held at the property, with many exceeding 100 guests. In print and online media, Villa de Suenos was described as "perfect for weddings" and touted as "St. Simon's Island's premier wedding destination;" and its website featured scores of photographs of weddings held at the property. Guests who booked Villa de Suenos were furnished with a list of preferred caterers, photographers, florists, wedding planners, and other similar vendors.

*Id.* at 544, 776 S.E.2d at 181.

180. *Id.* at 545, 776 S.E.2d at 181.

violated their constitutional rights to due process and equal protection.[181] After an evidentiary hearing, the trial court denied the Owners' constitutional claims, upheld the County's interpretation of the ordinance and compelled the owners of Villa de Suenos to comply with the ordinance, as interpreted by the County.[182] Specifically, the trial court held:

> The Burtons' permissible accessory use of their property to host a wedding or social event has become the primary use of their property, and the magnitude, frequency, and cumulative impact thereof has moved beyond that expected or customary for a one-family dwelling. Because this use falls outside the normal scope of residential property use, it is thus violative of the [Ordinance].[183]

When the Owners did not cease using the property as an event center, the County filed a motion for contempt. The trial court denied that motion. The County appealed; the Owners cross-appealed.[184]

The supreme court's analysis began by reciting the above quote from the trial court's order and declaring that: "[i]n the construction of an ordinance, 'the cardinal rule is to ascertain and give effect to the intention of the lawmaking body.'"[185] The express purpose, under the ordinance, of the zoning district where Villa de Suenos sits is to preserve and prevent any other uses from "adversely affecting the single-family residential character of the district."[186] Accordingly, the Ordinance limited the use of property in the district generally to "[o]ne-family dwelling[s]" and "[a]ccessory uses."[187] The court, as a result, concluded that the ordinance's clear intent was to restrict the use of properties in the district to residential uses and others customarily incidental thereto.[188] Use of Villa de Suenos as an event center on an average of twenty-five times a year caused the incidental, accessory use of the Villa as an event center to become one that "'sufficiently voluminous and

181. *Id.* The County counterclaimed seeking injunctive and declaratory relief tracking its interpretation of the Ordinance. *Id.*

182. *Id.*

183. *Id.* at 546, 776 S.E.2d at 182.

184. *Id.* The Owners' cross-appeal argued the trial court's second order was erroneous to the extent it reaffirmed the previous order. *Id.*

185. *Id.* (quoting Ervin Co. v. Brown, 228 Ga. 14, 15, 183 S.E.2d 743, 745 (1971)).

186. *Id.*

187. *Id.*

188. *Id.* at 547, 776 S.E.2d at 182.

mechanized'" to be outside the scope of permissible uses in the district under the ordinance.[189]

Affirming the trial court's implicit rejection of the Owner's due process vagueness challenge, the court concluded that the ordinance "is sufficiently specific for 'persons of common intelligence' to recognize that the [Owners'] . . . use of Villa de Suenos does not qualify as a permissible use in" the zoning district.[190] The court also affirmed the trial court's decision to not grant an injunction, based on the applicable abuse of discretion standard.[191] The court held that the trial court's first order—reviewing and affirming the interpretation of the ordinance—constituted a declaratory judgment (not an injunction) and, therefore, under O.C.G.A. § 5-6-46,[192] the Owner's appeal thereof operated as supersedeas to prevent enforcement of the first order and to strip the trial court of jurisdiction to hear the County's motion for contempt.[193] In doing so, the court noted that "an order simply delineating what the applicable legal authority requires or prohibits is a declaratory judgment. Such an order is not converted into an injunction merely because it directs a party to comply with the law so construed."[194] In other words, the Owners were always in violation of the ordinance, the trial court's first order merely specified the boundaries of compliance and non-compliance.[195] Accordingly, the first order was a declaratory judgment. Therefore, the trial court lacked jurisdiction to hear the motion for contempt and should have either denied it or held it in abeyance during the pendency of the appeal.[196]

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189. *Id.* at 548, 776 S.E.2d at 182–83 (quoting *Cawthon*, 248 Ga. at 765, 286 S.E.2d at 34). "The frequency of the events and the apparently systematic manner in which the property [was] marketed and utilized for large-scale gatherings support the conclusion that the property's use as an event venue . . . as the trial court found, 'moved beyond that expected or customary for a one-family dwelling.'" *Id.* (quoting *Cawthon*, 248 Ga. at 765, 286 S.E.2d at 34).

190. *Id.* at 549, 776 S.E.2d at 183 (quoting *105 Floyd Road, Inc.*, 279 Ga. at 348, 613 S.E.2d at 634).

191. *Id.* at 550–51, 776 S.E.2d at 185.

192. O.C.G.A. § 5-6-46 (2017).

193. *Burton*, 297 Ga. at 549–50, 776 S.E.2d at 184. "A declaratory judgment is 'a means by which a superior court 'simply declares the rights of the parties or express (its) opinion . . . on a question of law, without ordering anything to be done.'" *Id.* at 549, 776 S.E.2d at 184 (quoting Baker v. City of Marietta, 271 Ga. 210, 213, 518 S.E.2d 879, 883 (1999)). "An injunction, by contrast, imposes an affirmative duty on the party enjoined to either perform—or refrain from performing—a specified act." *Id.* at 550, 776 S.E.2d at 184.

194. *Id.* at 550, 776 S.E.2d at 184.

195. *Id.*

196. *Id.*

## IV. CONSENT ORDER LANGUAGE CONTROLS

The City of Dunwoody (the City) was a party in another significant case during the survey period. In *Olympus Media, LLC v. City of Dunwoody*,[197] Action Outdoor Advertising JV, LLC (Action) obtained permits in 2001 from DeKalb County (the County) to erect a billboard of certain dimensions.[198] Action, however, built a bigger billboard than permitted,[199] though both sizes violated the County's current ordinance. The County revoked Action's sign permit because the permitted and constructed sign exceeded that allowed by the County's ordinance. Action appealed; the trial court upheld the County's revocation finding that Action did not have a vested right in the revoked permit because, from its inception, the permit violated the County's ordinance.[200] That decision remains undisturbed.[201]

Instead of removing the sign, Action negotiated with the County to preserve its sign and resolve disputes concerning other proposed and existing billboards. During the negotiations, a new entity leased the sign and made physical changes to the billboard that increased its overall size. The trial court subsequently entered a consent order that finalized the legal status of all the unresolved billboards, including the billboard at issue here. That order "allow[ed] Action to retain certain signs 'as presently constructed.'"[202] Later the same year, Action was granted permits for the billboard at issue from both the Georgia Department of Transportation and the County that allowed the billboard "to be an indirectly illuminated, electronic, multi-message sign."[203] Rather than building the sign for which it had a permit, Action reconstructed the billboard so that it could accommodate a full-face digital LED billboard. Reconstruction involved deconstructing the existing sign and pole support, erecting a stronger pole, and installing new electrical wiring. After construction was completed, Action reinstalled the advertising sign that existed at the time of the consent order.[204]

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197. 335 Ga. App. 62, 780 S.E.2d 108 (2015).

198. *Id.* at 63, 780 S.E.2d at 109. The permit allowed for a 10 feet by 50 feet billboard. *Id.*

199. *Id.* The billboard was 14 feet by 48 feet. *Id.* The billboard at issue is located at 4368 N. Peachtree Road, which is currently in the City of Dunwoody. *Id.* at 63 n.3, 780 S.E.2d at 109 n.3. The billboard sits at the northwest corner of the Cotillion Drive and N. Peachtree Road intersection which is just north of the northeastern most part of Interstate 285. *Id.*

200. *Id.* at 63, 780 S.E.2d at 109.

201. *Id.*

202. *Id.* at 64, 780 S.E.2d at 110.

203. *Id.*

204. *Id.*

In December of the same year, the City was incorporated, and it adopted zoning ordinances and sign regulations. Roughly twenty months later, Action obtained a permit to install the necessary electrical equipment, and it installed a full-face digital LED sign on the billboard at issue. Action sold the billboard to Olympus Media, LLC (Olympus) later the same month. The next month, the City adopted a new sign ordinance, which it amended less than a year later. Based on its new sign ordinance (as amended), the City issued Olympus a citation for the sign. Before the citation was resolved at the city level, Olympus sued the City seeking declaratory relief. The trial court held that the current version of the sign was not authorized by and violated the consent order. Olympus only had a vested right to the sign as it existed at the time of the consent order. The trial court further held that Olympus did not have standing to challenge the City's sign ordinance because it had not applied for and been denied a permit. Both the City and Olympus appealed.[205]

On appeal, the Georgia Court of Appeals, quoting in bulk *Corliss Capital, Inc. v. Dally*,[206] reminded the litigants that a consent order is essentially a binding agreement of the parties that is sanctioned by a court.[207] It is subject to the rules governing the interpretation and enforcement of contracts,[208] and it can be construed according to the general rules of contract construction.[209] The court stated that Olympus's argument ignored the basic tenants of contract law and held that the trial court did not err in concluding that the consent order did not authorize the conversion of the billboard at issue "to a full-face digital LED sign."[210]

On appeal, Olympus also argued that the billboard should remain because the City lacked standing, and its sign ordinance, as amended, was invalid. The trial court determined that it did not need to analyze the claims because the billboard at issue violated the terms of the consent order as it existed at the time. Instead, the court held that a permit, such as the one issued to Olympus to permit "a full-face digital LED sign" in violation of the ordinance issued for "an illegal use or an illegal nonconforming use is void."[211] It cannot be utilized as an excuse to continue the illegal use because an illegal permit does not cause

205. *Id.* at 64–66, 780 S.E.2d at 110–11.

206. 268 Ga. App. 594, 602 S.E.2d 304 (2004).

207. *Olympus Media*, 335 Ga. at 66, 780 S.E.2d at 111.

208. *Id.* (quoting *Corliss Capital*, 268 Ga. App. at 595, 602 S.E.2d at 305).

209. *Id.* "Furthermore . . . where the language of a contact is plain and unambiguous, no construction is required or permissible and the terms of the contract must be given an interpretation of ordinary significance." *Id.*

210. *Id.* at 67–68, 780 S.E.2d at 112.

211. *Id.* at 68, 780 S.E.2d at 112.

constitutional rights to vest.[212] Therefore, Olympus could not use those permits to argue that the billboard, as it existed then, could remain.[213] Olympus's right to have the billboard was limited to that vested at the time of the consent order.[214] Olympus's challenge to the City's sign ordinance as applied to the billboard at issue was, therefore, moot.[215] Additionally, the court rejected the City's argument that Olympus abandoned any vested right it had in the billboard when it "dismantl[ed] the billboard and upgrad[ed] it to accommodate a full-face LED sign."[216] The City argued that Olympus's dismantling of the billboard was akin to abandoning an easement. The court found this unpersuasive because "[n]othing in the act of upgrading the disputed billboard evinces an intent to cease using the billboard."[217] Consequently, the trial court properly found that Action did not abandon its rights in the billboard.[218]

212. *Id.* (quoting Corey Outdoor Advertising, Inc. v. Bd. of Zoning Adjustments, 254 Ga. 221, 225–26, 327 S.E.2d 178, 183 (1985)).

> A permit issued for a use or structure which is forbidden by the ordinance is beyond the power of the officer to issue; consequently, it has no legal status, is invalid, and is itself entirely without power to clothe its holder with any legal rights thereunder. A permit for a use prohibited by a valid zoning ordinance, regulation, or restriction is void, of no effect, and subject to revocation. *This is true although the permit has been issued under a mistake of fact.* The expenditure of even substantial sums in reliance upon a permit found to be void is generally held not to raise an estoppel against its revocation or against enforcement of the ordinance found to be violated by the use or structures maintained pursuant to the permit.

*Corey Outdoor Advertising*, 254 Ga. at 225–26, 327 S.E.2d at 183.

213. *Olympus Media*, 335 Ga. at 68, 780 S.E.2d at 113.

214. *Id.* at 69, 780 S.E.2d at 113.

215. *Id.*

216. *Id.* at 69–70, 780 S.E.2d at 113.

217. *Id.* at 70, 780 S.E.2d at 113.

218. *Id.* at 70, 780 S.E.2d at 114.