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Zoning and Land Use Law

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The COVID-19 pandemic dramatically affected the world's economy and supply chains during this Survey period.[1] However, real estate development did not cease. In many urban and suburban areas, including the metropolitan Atlanta area, new development projects rose from the ground, despite the economic risks and challenges created by the pandemic. Nevertheless, the long-term impacts of the pandemic may fundamentally challenge many paradigms that have long sustained successful real estate development.

Prior to the pandemic, commercial retail developments, such as malls and destination shopping centers, were already in the economic doldrums due to the rise of e-commerce and their economic vitality diminished further as a result of the pandemic. The pandemic forced people to stay home for work and leisure. Employees utilized technology to work as efficiently from their homes as they had previously done from their offices, with the result that business continued despite the pandemic. While working from home, the same employees shopped online for everything, from cars to groceries. As a direct result of the pandemic, technology provided the means for society to learn how to work and shop without having to travel to traditional brick-and-mortar structures to do either. Eventually, these employees drove residential development

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1. For an analysis of zoning and land use law during the prior Survey period, *see* Newton M. Galloway & Steven L. Jones, *Zoning and Land Use Law*, *Georgia Survey*, 72 MERCER L. REV. 367 (2020). This Article surveys zoning and land use decisions decided between June 1, 2020, and May 31, 2021.

further from metropolitan centers, in what is becoming the "work from home" sprawl.

The impact of these developments is not yet fully known. But, it is likely that the pandemic will cause fundamental and lasting changes in all development that society will want or need in the future. Likely, new residential development (and the commercial development that will follow it) will drive industrial development and office redevelopment. These changes will impact future zoning policies and the ordinances local governments pass to implement them. These changes will also create new zoning issues that will arise in future Survey periods.

Despite the pandemic, litigation continued, albeit without any of the in-person components, some of which may never return. The case decisions, and constitutional and statutory amendments, during the Survey period fall into four categories:

> 1. Those questioning whether officials making zoning decisions are protected from suit in their individual or official capacities by sovereign and legislative immunity after *Lathrop v. Deal,*[2] particularly after Georgia voters ratified a constitutional amendment adding Georgia Constitution of 1983, Article I, Section II, Paragraph V(b), which waives sovereign immunity in response to *Lathrop* and its progeny;[3]
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> 2. Those continuing the transformation of local government zoning decisions from legislative acts into quasi-judicial decisions, which require appeal by petition for writ of certiorari and which superior courts review under the "any evidence" standard rather than the *de novo* review applied to legislate decisions;
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> 3. Those refining *Diversified Holdings, LLP v. City of Suwanee*;[4] and
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> 4. The enactment of section 32-3-3.2 of the Official Code of Georgia Annotated, which blurs previously clear lines between (i) who pays for consequential damages arising from condemnation of real property; and (ii) the legislature's generations-old delegation of plenary zoning power to local government.[5]

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

3. Ga. H.R. Res. 1023, Reg. Sess. (2020) (Ratified in the general election on November 3, 2020).

4. 302 Ga. 597, 807 S.E.2d 876 (2017).

5. O.C.G.A. § 32-3-3.2 (2021).

This Article will review decisions and amendments in all of these categories, addressing those involving sovereign immunity first.[6]

I. IMMUNITY ISSUES AND DEVELOPMENTS

A. Sovereign Immunity Constitutional Amendment

In *Lathrop* (discussed in prior years' Surveys), a super-majority of the Georgia Supreme Court held that sovereign immunity extends to constitutionally-based claims barring all causes of action against the state "including suits for injunctive and declaratory relief from the enforcement of allegedly unconstitutional laws" and bars actions against local government officials acting within the authority of their official capacities.[7]

Applied to a zoning case, *Lathrop* bars actions against city and county officials acting within the authority of their official positions, but it allows a claim to proceed against officials in their individual capacities.[8] The supreme court in *Lathrop* reiterated that only the legislature or constitutional amendment may waive sovereign immunity.[9] The legislature responded in 2019 when both chambers of the Georgia General Assembly passed House Bill 311[10] with zero "nay" votes.[11] HB

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6. Other cases of note arising during the Survey period are: Carson v. Brown, 358 Ga. App. 619, 856 S.E.2d 5 (2021) (holding that discussions with local government officials regarding development under a zoning ordinance and expenditure of funds in reliance upon those discussions creates vested rights to develop under the ordinance as it then exists if the official knew of the developer's intent to expand said funds); City of Douglasville v. Boyd, 356 Ga. App. 274, 844 S.E.2d 846 (2020) (accessory use, such as a driveway, must relate to a principal use permitted in the zoning district); Ham v. City of Milton, 358 Ga. App. 694, 856 S.E.2d 60 (2021) (sheriff's delay in serving writ of certiorari did not extend five day service requirement in O.C.G.A. § 5-4-6(b); There is no safe harbor under O.C.G.A. § 9-11-4 for service on the defendant-in-certiorari); Wheeler v. Best, 357 Ga. App. 646, 849 S.E.2d 247 (2020) (a bond or a pauper affidavit is a condition precedent to the sanctioning of a writ for certiorari, and while failure to file the bond is an amendable defect, a petition for writ of certiorari is subject to dismissal prior to a bond or pauper affidavit defect being corrected); Cherokee County v. Inline Cmtys., LLC, 356 Ga. App. 892, 849 S.E.2d 703 (2020) (refining what is (and what is not) a proper annexation versus an impermissible spoke-and-stem annexation); Thomas County v. WH Grp. 2, LLC, 359 Ga. App. 201, 857 S.E.2d 94 (2021) (failure to file an application for discretionary appeal with the Georgia Court of Appeals in a case regarding a "zoning decision" is fatal, resulting in the dismissal of improper direct appeal).

7. 301 Ga. at 444, 801 S.E.2d at 892.

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

9. *Id.* at 419, 801 S.E.2d at 876.

10. Ga. H.R. Bill 311, Reg. Sess. (2019) (unenacted).

11. *HB 311*, GEORGIA GENERAL ASSEMBLY, https://www.legis.ga.gov/legislation/54983 (last visited Sept. 1, 2020).

311 approved a waiver of sovereign immunity for any claim seeking declaratory or injunctive relief in an action against a state or local government official or employee, in their official capacity, challenging enforcement of an unconstitutional state statute or an unconstitutional or illegal local government ordinance or action.[12]

HB 311's waiver of sovereign immunity would have permitted claims such as those in *Lathrop*, and others, which plaintiffs typically assert in a zoning case against local government officials when the application of a zoning ordinance or zoning decision allegedly exceeds the officials' authority or violates the property owner's constitutional rights. With a number of caveats, HB 311 would have permitted Georgia citizens to challenge the unconstitutionality of zoning regulations and decisions by seeking declaratory or injunctive relief against state and local government officials in their official capacities.[13] But, Governor Kemp vetoed HB 311.[14]

In response to that veto, during the 2020 legislative session, the General Assembly authorized a referendum, permitting Georgia voters to decide whether the state's constitution should be amended to waive sovereign immunity to permit causes of action *Lathrop* and its progeny otherwise barred.[15] In the November 2020 election cycle, the state's electorate ratified a constitutional amendment (the Constitutional Amendment) creating subsection (b) to Article I, Section II, Paragraph V of the 1983 Constitution of the State of Georgia.[16] The new amendment provides as follows:

> (1) Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this

12. Ga. H.R. Bill 311 at §§ 1-1–2-1.

13. *Id.*

14. *Id.*; *see 2019 Vetoed Legislation*, OFFICE OF THE GOVERNOR, https://gov.georgia.gov/executive-action/legislation/vetoed-legislation/2019-vetoed-legislation (last visited Sept. 1, 2020).

15. Ga. H.R. Res. 1023, § 1, Reg. Sess.; GA. CONST. art. I, § II, para. 5 (showing that the constitutional provision is much more narrowly tailored than HB 311, which textual differences (and the political implications therefrom) are beyond the scope of this article).

16. *Id.*

> Paragraph may, only after awarding declaratory relief, enjoin such acts to enforce its judgment. Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.
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> (2) Actions filed pursuant to this Paragraph against this state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof shall be brought exclusively against the state and in the name of the State of Georgia. Actions filed pursuant to this Paragraph against any county, consolidated government, or municipality of the state or officer or employee thereof shall be brought exclusively against such county, consolidated government, or municipality and in the name of such county, consolidated government, or municipality. Actions filed pursuant to this Paragraph naming as a defendant any individual, officer, or entity other than as expressly authorized under this Paragraph shall be dismissed.
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> (3) Unless otherwise provided herein, this Paragraph shall not affect the power or duty of a court to dismiss any action or deny relief based on any other appropriate legal or equitable ground or other limitation on judicial review, including, but not limited to, administrative exhaustion requirements, ante litem notice requirements, sanctions for frivolous petitions, standing, statutes of limitation and repose, and venue. The General Assembly by an Act may limit the power or duty of a court under this Paragraph to dismiss any action or deny relief.
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> (4) No damages, attorney's fees, or costs of litigation shall be awarded in an action filed pursuant to this Paragraph, unless specifically authorized by Act of the General Assembly.
>
> (5) This Paragraph shall not limit the power of the General Assembly to further waive the immunity provided in Article I, Section II, Paragraph IX and Article IX, Section II, Paragraph IX. This Paragraph shall not constitute a waiver of any immunity provided to this state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof by the Constitution of the United States.[17]

Like most new laws, the constitutional amendment creates many new questions. Foremost, if a complaint names one or more local (or state) government officers or employees—in any capacity, individual, official,

17. GA. CONST. art. 1, § 2, para. 5.

or both—and asserts claims other than (but in addition to) claims for declaratory judgment and injunctive relief, is the entire case subject to dismissal or are only the officials (in all capacities) subject to dismissal with respect to only the claims for declaratory judgment and injunctive relief? Either way, can a plaintiff avoid dismissal if the complaint makes it clear that the claims for declaratory judgment and injunctive relief are asserted solely against the local government, pursuant to the Constitutional Amendment?

Additionally, zoning applicants on appeal often assert a claim for attorney's fees, although such a stand-alone claim is procedurally improper.[18] Nonetheless, and regardless of whether the plaintiff properly asserts the claim, the instant Constitutional Amendment makes it clear that a plaintiff cannot recover attorneys' fees and costs and expenses of litigation from a local (or state) government in actions for declaratory and injunctive relief alleging ultra vires or unconstitutional actions (or inactions) of local, state, or both types of government officers or employees.[19]

All noteworthy land use and zoning decisions during the Survey period preceded the ratification of the waiver of sovereign immunity Constitutional Amendment. To the extent those decisions involve claims for declaratory or injunctive relief against government officials for allegedly unconstitutional or ultra vires actions, courts must now analyze such claims in view of the Constitutional Amendment.[20]

B. Board of Commissioners of Lowndes County v. Mayor & Council of Valdosta

In *Board of Commissioners of Lowndes County v. Mayor & Council of Valdosta*,[21] regarding the Service Delivery Strategy Act (the SDS Act),[22] the Supreme Court of Georgia faced a unique factual circumstance in which it held that claims asserted against governmental officers in their individual capacities were (effectively) asserted against the state and, thus, barred by sovereign immunity.[23] In other words, the "[s]tate cannot be the 'real party in interest.'"[24] There, a county board of commissioners (the BOC) sought declaratory and injunctive (and other) relief against

18. *E.g.*, Brown v. Baker, 197 Ga. App. 466, 467, 398 S.E.2d 797, 799 (1990).
19. GA. CONST. art. 1, § 2, para. 5.
20. *Id.*
21. 309 Ga. 899, 848 S.E.2d 857 (2020).
22. O.C.G.A. § 36-70-20 (2021).
23. 309 Ga. at 899, 848 S.E.2d at 857.
24. *Id.* at 899, 848 S.E.2d at 858.

state agency officials, in both their individual and official capacities, in response to an action of the agency imposing sanctions on local governments for failure to meet deadlines under the SDS Act.[25]

On appeal, the supreme court restated the holding in *Lathrop* that although sovereign immunity generally bars claims for declaratory and injunctive relief, it generally does not do so for such claims against governmental officers in their individual capacities for allegedly unconstitutional acts.[26] That is because such a suit is one against the "individual stripped of [their] official character," as opposed to the individual officially, and thus, the state.[27]

Nonetheless, sovereign immunity may still bar a claim against a governmental official, in their individual capacity, if the state is the real party in interest because the claim "attempts to control the real property rights [or] contractual obligations of the State."[28] Just because the claim seeks to compel a governmental officer or employee to take (or refrain from taking) action in order to make that officer or employee's official actions lawful does not mean the state is the real party in interest.[29]

To the contrary, sovereign immunity does not bar a declaratory or injunctive relief claim that asserts facts alleging "'unlawful conduct of [a] public officer[].'"[30] Therefore, in Board of Commissioners of Lowndes County, the court remanded the case for further proceedings to determine whether the BOC asserted such unlawful conduct by the agency officers or, instead, whether the state is the real party in interest.[31] After the Constitutional Amendment, the BOC would have had to name the state agency against which it sought relief and not the agency officers.

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25. *Id*. at 900–01, 848 S.E.2d at 858–59.

26. *Id*. at 902–03, 848 S.E.2d at 860.

27. *Id*. at 904, 848 S.E.2d at 860. (quoting Int'l Bus. Machs. Corp. v. Ga. Dep't of Admin. Servs., 265 Ga. 215, 220, 453 S.E.2d 706, 711 (1995) (Benham, J., concurring in part and dissenting in part), *overruled on other grounds by* Ga. Dep't. of Nat. Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 755 S.E.2d 184 (2014)).

28. *Id*. at 905, 848 S.E.2d at 861.

29. *Id*. at 904–05, 848 S.E.2d at 861.

30. *Id*. at 907, 848 S.E.2d at 863 (quoting *Ga. Dep't of Nat. Res.*, 294 Ga. at 603, 755 S.E.2d at 192).

31. *Id*. at 908, 848 S.E.2d at 863 ("Neither lower court concluded that dismissal of the claims for injunctive and declaratory relief was warranted on the basis that the County had not shown that the State Defendants were acting outside their lawful authority. That is a question to be decided on remand as the case goes forward").

C. Dawson County Board of Commissioners v. Dawson Forest Holdings, LLC

The Georgia Court of Appeals in *Dawson County Board of Commissioners v. Dawson Forest Holdings, LLC*,[32] held that sovereign immunity barred declaratory and injunctive relief claims against members of the governing authority of the county, its board of commissioners, in their official capacities.[33] However, as *Lathrop* noted, sovereign immunity did not bar the declaratory and injunctive relief claims against the BOC members in their individual capacities.[34]

Likewise, legislative immunity, which makes "'[i]ndividuals acting in a legislative capacity . . . absolutely immune from suit,'" did not bar the declaratory judgment and injunctive relief claims against the BOC members in their individual capacity because the court reasoned that the BOC members were only entitled to legislative immunity for decisions made when they were wearing their "decision maker" hats (that is, when passing legislation), as opposed to their "enforcement" hats (namely, when enforcing a current zoning district and its regulations).[35] The court distinguished between the "legislative" and "enforcement" functions of BOC members, stating:

> The complaints, viewed in Dawson Forest's favor, . . . allege that the [members of the BOC] wear two hats—as decision-makers voting on the rezoning petitions (which for purposes of argument we will refer to as the "legislative hat") and as enforcers of already-established zoning classifications (which we will refer to as the "enforcement hat"). Dawson Forest's claims concern the commissioners' acts while wearing their enforcement hats, not their legislative hats. The claims seek nonmonetary, declaratory, and injunctive relief from future enforcement by the commissioners of the allegedly unconstitutional zoning classification of its properties—the very type of prospective remedies that our Supreme Court described in *Lathrop* . . . .[36]

The court found that the precedent it analyzed, and the BOC cited, supported this conclusion.[37] Additionally, citing *Board of Commissioners of Lowndes County*, the court rejected an argument that sovereign immunity barred the claims against the BOC members in their

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32. 357 Ga. App. 451, 850 S.E.2d 870 (2020).

33. *Id.* at 454, 850 S.E2d at 874.

34. *Id.* at 457, 850 S.E.2d at 875–76.

35. *Id.* at 456, 850 S.E.2d at 875 (quoting Saleem v. Snow, 217 Ga. App. 883, 886, 460 S.E.2d 104, 107 (1995) (physical precedent only)).

36. *Id.* at 457, 850 S.E.2d at 875–76.

37. *Id.* at 457–58, 850 S.E.2d at 876 (discussing Lathrop and Goldrush II).

individual capacities because the BOC members in their official capacities were the real parties in interest.[38] Like the result in *Board of Commissioners of Lowndes County*, the alignment of the parties will be much different (and much cleaner) after the Constitutional Amendment.

D. Starship Enterprises of Atlanta, Inc. v. Nash—legislative immunity shields members of local governing authorities, in their individual capacities, from claims seeking declaratory and injunctive relief.

The Georgia Court of Appeals in *Starship Enterprises of Atlanta, Inc. v. Nash*[39] answered a lingering, but troublesome, question after *Lathrop* (and *Dawson County Board of Commissioners*): does legislative immunity foreclose the ability of a party allegedly aggrieved by a legislative zoning (or other land use) decision (such as the enactment of a zoning ordinance) from asserting claims for declaratory and injunctive relief regarding that decision?[40] Were it not for the Constitutional Amendment, the lasting effect of *Starship* would be problematic for persons and entities seeking to appeal adverse local government legislative decisions.

The legislative decision at issue in *Starship* was an ordinance amendment regarding "adult establishment[s]" and requiring "sex paraphernalia store[s]" to obtain a specific license.[41] Starship Enterprises of Atlanta, Inc. (Starship), challenging the ordinance on its face, initially sued the local government seeking declaratory and injunctive relief alleging the ordinance was unconstitutional. Then, the Georgia Supreme Court decided *Lathrop*, and Starship dismissed its suit against the local government. Starship refiled asserting similar claims, but this time against the members of the governing authority in their individual capacities.[42]

The members of the governing authority moved to dismiss the new complaint asserting that legislative immunity barred the claims against them in their individual capacities.[43] "Under the doctrine of legislative immunity, members of the General Assembly [and local officials acting in a legislative capacity] are afforded immunity from 'any type of legal action' brought against them in connection with acts performed by them in their legislative capacities."[44] The court in *Starship* held that the

38. *Id.* at 459–60, 850 S.E.2d at 877.

39. 357 Ga. App. 106, 850 S.E.2d 187 (2020).

40. *Id.* at 111, 850 S.E.2d at 191.

41. *Id.* at 107, 850 S.E.2d at 189.

42. *Id.* at 106, 850 S.E.2d at 188.

43. *Id.* at 109, 850 S.E.2d at 189–90.

44. *Id.* at 109, 850 S.E.2d at 190 (quoting Village of North Atlanta v. Cook, 219 Ga. 316, 320, 133 S.E.2d 585, 588 (1963)); *see* GA. CONST. art. III, § 4, para. 9.

members of the governing authority "in enacting the [o]rdinance [at issue], . . . clearly were engaged in core legislative function."[45]

If the Constitutional Amendment had not been ratified less than a month later, *Starship* would have had implications for challenges to ordinances facially and rezoning approvals with conditions that an applicant desired to appeal. In addition to enactment of an ordinance, a rezoning with or without conditions is, as defined in the Georgia Zoning Procedures Law,[46] a legislative act because it amends the local government's zoning map, which is typically incorporated by reference as a part of the zoning (or unified development) ordinance.[47] If a local government approved a rezoning application and imposed zoning conditions unacceptable to the applicant (or zoned the subject property to a district other than that requested and under which the applicant could not develop), then the officials making the zoning decision would be immune from declaratory and injunctive relief in their individual capacities, due to legislative immunity, and their official capacities under sovereign immunity.[48] As a result, without the Constitutional Amendment, a zoning applicant would be without a remedy to challenge the constitutionality of the action. Like the court of appeals noted in *Dawson*, "hold[ing] that legislative immunity bar[s] claims for prospective remedies regarding [an] act . . . would leave [a zoning applicant] . . . with no recourse against the alleged unconstitutional zoning classifications" or conditions.[49]

E. Department of Transportation v. Mixon—sovereign immunity does not bar an inverse condemnation claim.

Department of Transportation v. Mixon[50] reaffirmed that when a state or local government creates a nuisance, the claim properly sounds in inverse condemnation.[51] That is because the "'Constitution itself requires

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> The members of both houses shall be free from arrest during sessions of the General Assembly, or committee meetings thereof, and in going thereto or returning therefrom, except for treason, felony, or breach of the peace. No member shall be liable to answer in any other place for anything spoken in either house or in any committee meeting of either house.

45. *Id.* at 110, 850 S.E.2d at 190 (citing Schumacher v. City of Roswell, 301 Ga. 635, 638, 803 S.E.2d 66, 69 (2017)).

46. O.C.G.A. § 36-66-1 (2021).

47. O.C.G.A. § 36-66-3(4) (2021).

48. *Id.*

49. 357 Ga. App. at 459, 850 S.E.2d at 876.

50. 355 Ga. App. 463, 844 S.E.2d 524 (2020) *cert. granted*, No. S20C1410, 2021 Ga. LEXIS 53 (Feb. 1, 2021).

51. *Id.* at 465, 844 S.E.2d at 527.

just [and adequate] compensation for takings and cannot, therefore, be understood to afford immunity in [a] case[]" asserting that a local government creates or maintains "a nuisance which constitutes either a danger to life and health or a taking of property."[52]

Although Mixon pled both a continuing nuisance claim and an inverse condemnation claim, the trial court and the court of appeals found that Mixon really only "brought an inverse condemnation claim arising out of an alleged nuisance to which sovereign immunity is inapplicable."[53] That is because "the 'nuisance exception' [to sovereign immunity] . . . [is] not an exception at all, but instead a proper recognition that the Constitution itself requires just compensation for takings and, therefore, cannot be understood to afford immunity in such cases."[54]

II. THE CONTINUING (BUT INCOMPLETE) TRANSFORMATION OF LEGISLATIVE ZONING ACTS INTO QUASI-JUDICIAL DECISIONS

Survey articles in prior years reviewed appellate decisions that commenced the transformation of zoning decisions from legislative acts into judicial decisions, starting with *City of Cumming v. Flowers*.[55] The Georgia Supreme Court held that a challenge to a local government's denial of a variance must come to superior court by a petition for writ of

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52. *Id.* (quoting *Ga. Dep't. of Nat. Res.*, 294 Ga. 593, 600, 755 S.E.2d 184, 190 (2014)). Such a claim is subject to a four-year statute of limitations. *Id.* at 466, 844 S.E.2d at 528. Whether a nuisance is permanent or continuing often controls whether a landowner can recover. *Id.* The line is defined as follows:

> The classification of a nuisance as continuing or permanent directly controls the manner in which the statute of limitation[] will be applied to the underlying claim. A nuisance, permanent and continuing in its character, the destruction or damage being at once complete upon the completion of the act by which the nuisance is created, gives but one right of action, which accrues immediately upon the creation of the nuisance, and against which the statute of limitation[] begins, from that time, to run. Where a nuisance is not permanent in its character, but is one which can and should be abated by the person erecting or maintaining it, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie. This action accrues at the time of such continuance, and against it the statute of limitation[] runs only from the time of such accrual.

Id. (quoting Liberty Cnty. v. Eller, 327 Ga. App. 770, 772–73, 761 S.E.2d 164, 168 (2014)). Additionally, an inverse condemnation claim does not require an expert affidavit under O.C.G.A. § 9-11-9.1 because "[n]egligence is not . . . a necessary ingredient of a cause of action growing out of a nuisance [which] may arise through acts and conduct done within the pale of the law and executed with due care." *Id.* at 468, 844 S.E.2d. at 529 (quoting City of Macon v. Roy, 34 Ga. App. 603, 606, 130 S.E. 700, 702 (1925)).

53. *Id.* at 465, 844 S.E.2d at 527.

54. *Id.* (quoting *Ga. Dep't. of Nat. Res.*, 294 Ga. at 600, 755 S.E.2d at 190).

55. 300 Ga. 820, 797 S.E.2d 846 (2017).

certiorari[56] because it is a quasi-judicial decision.[57] The following year in *York v. Athens College of Ministry*,[58] the Georgia Court of Appeals held that a decision to grant or deny a special or conditional use permit is also a quasi-judicial decision, that can be appealed only by a petition for a writ of certiorari.[59] *York* also precluded the superior court's consideration in a certiorari proceeding of any issue raised on appeal that a party did not first present to the local government in the zoning hearing, indicative of the "any evidence" rule applied to quasi-judicial decisions.[60] The holding in *York* was particularly significant because the "grant of a permit relating to a special use of property,"[61] is a "zoning decision" under Zoning Procedures Law (ZPL),[62] which defines such a decision as a "legislative action."[63]

Despite ZPL's definition, in 2020, the Georgia Court of Appeals in *Riverdale Land Group, LLC v. Clayton County*,[64] applied three "characteristics" to define an SUP as a quasi-judicial act: (a) All parties are entitled to notice, a hearing, and to present evidence as a matter of right at the hearing; (b) A decision process that is judicial in nature, ascertaining relevant facts in evidence and the application of preexisting legal standards to those facts; and (c) A decision that is final, binding, and conclusive of the rights of interested parties.[65]

With these decisions, Georgia's appellate courts commenced what seemed to be a methodical march to transform legislative zoning acts into quasi-judicial decisions. Cases arising during the Survey period continued the transformation, but they did not complete it.

A. Application of the Riverdale Land Group Factors—City of Rincon v. Ernest Communities, LLC

Applying the *Riverdale Land Group* factors the Georgia Court of Appeals in *City of Rincon v. Ernest Communities, LLC*, held that the denials of a site plan and permit applications were quasi-judicial

56. O.C.G.A. § 5-4-1(a) (2021).

57. *City of Cumming*, 300 Ga. at 825, 797 S.E.2d at 851–52.

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

59. *Id.* at 61, 821 S.E.2d at 123–24.

60. *Id.* at 64, 821 S.E.2d at 125.

61. *Id.* at 62, 821 S.E.2d at 124.

62. O.C.G.A. § 36-66-3(4).

63. *York*, 348 Ga. App. at 61–62, 821 S.E.2d at 124; *see also* Bentley v. Chastain, 242 Ga. 348, 349 n.3, 249 S.E.2d 38, 40 n.3 (1978).

64. 354 Ga. App. 1, 840 S.E.2d 132 (2020).

65. *Id.* at 3–4, 840 S.E.2d at 134.

decisions.[66] Ernest Communities, LLC (Ernest) applied for site plan approval and development permits to construct seventy-eight townhomes. The city had previously approved a master development plan, but Ernest applied for development permits pursuant to a modified version of that plan. The city denied Ernest's applications, and Ernest appealed contending (among other things) that the city's applicable ordinance was void because the city adopted it in violation of ZPL. Ernest specifically asserted claims for declaratory judgment and a writ of mandamus to direct the city to issue the permits. The trial court agreed with Ernest and granted its motion for summary judgment. The city appealed.[67]

On appeal, the city contended that Ernest was required to appeal by writ of certiorari because mandamus relief is not the proper remedy to correct a quasi-judicial decision.[68] The court of appeals agreed, holding that the city's denial of Ernest's application was a quasi-judicial decision, satisfying all three characteristics reiterated in *Riverdale Land Group*.[69] Therefore, Ernest could not seek a writ of mandamus and could only appeal by writ of certiorari. Having failed to appeal by writ of certiorari, Ernest's challenge failed, and the court reversed the decision of the trial court and dismissed Ernest's complaint.[70]

B. Application of the "Any Evidence" Rule—Forsyth County v. Mommies Properties, LLC

Historically, the superior court's review of a local government's legislative zoning act, such as a rezoning, is *de novo*.[71] However, if the transformation is completed and that legislative zoning action becomes a quasi-judicial decision which must be appealable by petition for writ of certiorari[72] then the "any evidence" rule applies.[73]

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66. 356 Ga. App. 84, 93, 846 S.E.2d 250, 258 (2020).

67. *Id.* at 85, 846 S.E.2d at 253.

68. *Id.* at 90, 846 S.E.2d at 256.

69. *Id.* at 93, 846 S.E.2d at 258.

70. *Id.*

71. *Id.* at 84, 846 S.E.2d at 253.

72. O.C.G.A. § 5-4-1 (2021).

73. O.C.G.A. § 5-4-12 (2021). *See e.g.*, DeKalb Cnty. v. Bull, 295 Ga. App. 551, 552, 553 n.2, 672 S.E.2d 500, 502 n.2 (2009) (quoting Jamal v. Thurmond, 263 Ga. App. 320, 320, 587 S.E.2d 809, 810 (2003)); Macon-Bibb Cnty. Plan. and Zoning Comm'n. v. Epic Midstream, LLC, 349 Ga. App. 568, 572, 826 S.E.2d 403, 407 (2019) (physical precedent only) ("'Substantial evidence' under [O.C.G.A. § 5-4-12] has been consistently interpreted to mean 'any evidence'").

In fact, this was the holding in *Forsyth County. v. Mommies Properties, LLC*.[74] Mommies Properties, LLC (Mommies) owned 3.92 acres zoned Commercial Business District under the Forsyth County Unified Development Code (UDC) located adjacent to (and originally part of) the Chattahoochee River Club (River Club), a development which contains 600 single-family homes. The River Club developer built a large horse barn on the property that it ultimately sold to Mommies. The River Club Property Owners Association (the HOA) enforces covenants restricting Mommies' property. River Club residents complained to the county about severe deforestation, construction noise, land disturbance, and dirt piles on Mommies' property. Forsyth County Code enforcement inspected Mommies' property and found numerous violations. As a result, the county issued stop work orders.[75]

Ultimately, the county required Mommies to submit a soil erosion and sedimentation plan in order to pile dirt on the property. Mommies contended that the plan was not necessary and appealed to the Forsyth County Zoning Board of Appeals (the ZBA). Before the ZBA, Mommies appeared pro se and did not present any witnesses or tender any evidence. The county presented a number of witnesses, and Mommies "was afforded an opportunity to cross-examine each of [them]," but did not do so. The ZBA denied Mommies' appeal. Mommies appealed to the Superior Court of Forsyth County by petition for writ of certiorari, raising a number of evidentiary issues, among them an allegation that the ZBA's decision improperly relied on hearsay evidence. The trial court ruled in favor of Mommies and reversed the ZBA.[76]

The Court of Appeals of Georgia reversed, holding that the trial court was "bound by the facts and evidence presented to the administrative body."[77] It noted that Mommies "did not raise any objections with respect to the application of the evidentiary rules by the hearing officer or the procedures adopted at the hearing."[78] Mommies contended that "it did not know that the proceeding would be akin to a 'trial' with certain rules and procedures for admitting evidence."[79] But, the court held that Mommies "knowingly assumed the risk of appearing before the ZBA without counsel" and that Mommies had the opportunity to cross-examine the county's witnesses. The court held that the evidence in the

74. 359 Ga. App. 175, 183–84, 855 S.E.2d 126, 134.
75. *Id.* at 177–79, 855 S.E.2d 129–31.
76. *Id.* at 178–79, 855 S.E.2d at 131.
77. *Id.* at 191, 855 S.E.2d at 138.
78. *Id.* at 185, 855 S.E.2d at 135.
79. *Id.* at 186, 855 S.E.2d at 135.

record was sufficient to support the ZBA's denial under the "any evidence" rule.[80] As a result, the court reinstated the ZBA's decision.[81]

The hearing process Forsyth County utilized appears (likely following *York*) to follow the procedure and format of an administrative hearing in a "contested case," defined in Georgia's Administrative Procedures Act (the APA).[82] The ZBA hearing conducted on Mommies' appeal differs significantly from a traditional zoning hearing that most local governments usually conduct. Even though an appeal from an administrative decision is not a zoning decision, in such appeals most jurisdictions use a hearing procedure comparable to that used for rezoning.[83] ZPL provides:

> Local governments shall adopt policies and procedures which govern calling and conducting hearings required by [O.C.G.A. §] 36-66-4, and printed copies of such policies and procedures shall be available for distribution to the general public. Such policies and procedures shall specify a minimum time period at hearings on proposed zoning decisions for presentation of data, evidence, and opinion by proponents of each zoning decision and an equal minimum time period for presentation by opponents of each proposed zoning decision, such minimum time period to be no less than ten minutes per side.[84]

An appointed hearing officer presided over Mommies' appeal to the ZBA. The hearing included live witness testimony, allowed cross-examination and evidentiary objections, and was presumably memorialized in a formal written decision.[85]

As legislative zoning actions are transformed into quasi-judicial decisions, parties and practitioners can expect more formal "judicial-like" procedures in zoning hearings such as the hearing Forsyth County used in *Mommies*. The implications of requiring local governments to use increasingly formal procedures to make decisions that have been characterized as "legislative actions" will be significant and possibly impractical. The holding in *Mommies* involving an appeal from an administrative decision has traditionally been quasi-judicial.[86] However, these procedures will typify the hearing requirements as zoning hearings

80. *Id.* at 189–90, 855 S.E.2d at 137.
81. *Id.* at 191–92, 855 S.E.2d at 139.
82. *See* O.C.G.A. § 50-13-2(2) (2021).
83. *See* O.C.G.A. § 36-66-5 (2021).
84. O.C.G.A. § 36-66-5(a) (2021).
85. *Mommies,* 259 Ga. App. at 185, 855 S.E.2d at 134–35.
86. *Id.* at 191, 855 S.E.2d at 138.

are transformed into administrative hearings, akin to those that the APA governs, over which administrative law judges preside.

C. The Next Decision in the Transformation

The decisions in *City of Rincon* and *Mommies* consistently followed the holdings in *City of Cumming*, *York*, and *Riverdale Land Group,* each moving the transformation of legislative zoning acts into quasi-judicial decisions forward. However, this transformation will not be complete until a Georgia appellate court holds that approval or denial of a rezoning application is a quasi-judicial decision. Couched in the text of ZPL, the specific issue is whether "[t]he adoption of an amendment to a zoning ordinance which rezones property from one zoning classification to another" is a quasi-judicial decision.[87] As yet, a court has not so held.

Having earlier discussed the part of the opinion that addressed sovereign immunity, *Dawson County Board of Commissioners v. Dawson Forest Holdings, LLC* is also noteworthy here because the Georgia Court of Appeals sidestepped the issue of whether a rezoning is a judicial act.[88] In 2016, Dawson Forest filed an application to rezone property from Residential-Agricultural (R-A) to Residential Multi-Family (RMF), as defined in the Dawson County (County) Zoning Ordinance. The County's staff recommended conditional approval, citing consistency of the multi-family housing requested in the application with the County's comprehensive plan and future land use map and suitability of the proposed use with surrounding properties. The Board of Commissioners (the BOC) denied rezoning. Subsequently, Dawson Forest filed a second application seeking rezoning for a nearly identical development. In contrast with its recommendation on Dawson Forest's first application, the staff recommended denial. The BOC again denied Dawson Forest's second rezoning application. After suffering a second denial, Dawson Forest appealed the BOC's decision to Dawson County Superior Court.[89]

As noted earlier, Dawson Forest's complaint included claims for declaratory relief, injunctive relief, and a writ of mandamus directing the BOC to rezone the property. It included allegations against the county commissioners, in their official and individual capacities. The trial court held that sovereign immunity barred Dawson Forest's claims against the

87. O.C.G.A. § 36-66-3(C) (2021). *See* O.C.G.A. § 36-66-3(D) (2021) (identifying "[t]he adoption of an amendment to a zoning ordinance by a municipal local government which zones property to be annexed into a municipality" as a zoning decision, though the act of annexation is not and therefore, annexation and rezoning are separate functions).

88. *Dawson Cnty. Bd. of Comm'rs*, 357 Ga. App. at 456, 850 S.E.2d at 875.

89. *Id.* at 453–54, 850 S.E.2d at 872–73.

BOC members officially, but the claims alleged against them individually could proceed.[90]

The BOC members contended that legislative immunity barred the claims Dawson Forest asserted against them individually, citing *Diversified Holdings*. Specifically, Dawson Forest quoted *Diversified Holdings* for the proposition that "a rezoning decision affecting a particular piece of property may no longer be considered a legislative act."[91] The court noted that *Diversified Holdings*'s statement regarding rezoning decisions was made in the context of the test for "determining the proper procedure for seeking appellate review," which is a different test from that discussed below.[92] Instead of reconciling the tests, the court sidestepped the issue stating:

> We need not resolve that issue, however, because assuming the [BOC members'] votes against rezoning the properties *were* legislative acts, the [BOC members] are not entitled to legislative immunity in th[is] case[]. This is because Dawson Forest's claims do not arise from the [BOC members'] past votes on the properties' zoning classifications. Instead, its claims for declaratory and injunctive relief arise from the [BOC members'] anticipated future enforcement of allegedly unconstitutional zoning classifications.[93]

As noted earlier, the court distinguished between the actions of the BOC members based on whether they wore "legislative" or "enforcement" hats at the time of their action.[94] Since the BOC members offered "no persuasive argument that the *enforcement*" of a zoning classification is a legislative act, the court held that the county commissioners wore their "enforcement" hats as they continued to apply (or enforce) the allegedly unconstitutional zoning classification applied to Dawson Forest's property that prevented the development of multi-family housing.[95] As also noted above, the BOC members cited *Lathrop* to assert that sovereign immunity barred the claims against them in their individual capacities.[96]

The court of appeals disagreed.[97] Viewing the complaint most favorably to Dawson Forest on a motion to dismiss, the court reasoned:

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90. *Id.* at 454, 850 S.E.2d at 873.
91. *Id.* at 457, 850 S.E.2d at 875.
92. *Id.*
93. *Id.* (emphasis in original).
94. *Id.* at 457, 850 S.E.2d at 875–76.
95. *Id.* at 458–59, 850 S.E.2d at 876.
96. *Id.* at 459–60, 850 S.E.2d at 877.
97. *Id.* at 456, 850 S.E.2d at 875.

> Were we to hold that legislative immunity barred claims for prospective remedies regarding the act of enforcement, that would leave Dawson Forest with no recourse against the allegedly unconstitutional zoning classifications. Our Supreme Court has recognized that courts have a role in considering the constitutionality of zoning decisions. We decline to apply legislative immunity in a way that would foreclose such consideration.[98]

The court of appeals allowed Dawson Forest's claims against the commissioners, individually, to proceed.[99]

The holding in *Dawson Forest* was plainly result-driven. Dawson Forest presented the court with facts evidencing the County's disregard of the prospective planning policies it adopted in its comprehensive plan.[100] Dawson Forest applied to rezone its property to a multi-family classification twice. The County's staff recommended approval of the first application based on the County's comprehensive plan and future land use map, as well as compatibility of the development with nearby properties. Though the County's comprehensive plan did not change and there was no substantive difference between the applications, the staff recommended denial of the second application. The BOC denied each application.[101]

Further, Dawson Forest did what local governments and planners (in particular) want developers to do: review the County's comprehensive plan prior to development and propose development that is consistent with the plan. In sum, the County implemented a comprehensive plan which anticipated development of multi-family dwellings on Dawson Forest's property, but it did not follow it. Ultimately, the County lost the case because it failed to comply with its own future land development policies or (at a minimum) explain its deviation from them.[102]

The court of appeals' "two hat" distinction—between legislative and enforcement actions—provided a remedy to Dawson Forest to protect its proposed development from a potentially arbitrary and capricious denial by the BOC, which failed to follow its existing development and zoning policies set forth in its comprehensive plan.[103] The court of appeals stretched to allow Dawson Forest's suit to proceed before enforcement

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98. *Id.* at 459, 850 S.E.2d at 876 (citations omitted).

99. *Id.* at 460–61, S.E.2d at 877–78.

100. GEORGIA DEPARTMENT OF COMMUNITY AFFAIRS, DAWSON COUNTY COMPREHENSIVE PLAN 2013–33 (2013), https://www.dca.ga.gov/sites/default/files/dawson_county_comp_plan_update_2013_0.pdf.; *see* O.C.G.A. § 36-70-3 (2021).

101. *Dawson Cnty. Bd. of Comm'rs.*, 357 Ga. App. at 453–54, 850 S.E.2d at 873.

102. *Id.* at 453, 850 S.E.2d at 873.

103. *Id.* at 457, 850 S.E.2d at 875–76.

even commenced.[104] To reach this result, the court of appeals had no choice but to reaffirm that a rezoning decision is still a legislative act, not a quasi-judicial decision.[105] The decision in *Dawson Forest* appears to be a detour on the road to transform a legislative rezoning act into a judicial decision. The question of whether Georgia's appellate courts will hold that the approval or denial of a rezoning application is a quasi-judicial decision will have to wait.

III. REFINEMENT OF DIVERSIFIED HOLDINGS, LLP V. CITY OF SUWANEE

In 2017, the Georgia Supreme Court held in *Diversified Holdings, LLP v. City of Suwanee*[106] that a taking of property through inverse condemnation from a zoning regulation action cannot occur unless "the owner was completely deprived of the use of the property."[107] It noted (citing supporting federal authorities)[108] that a takings 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.'"[109] Zoning, the supreme court continued, "does not ordinarily present the kind of affirmative public use at the expense of the property owner that effects a taking," and it is unlikely to be "fertile ground" for inverse condemnation claims.[110] To reach its decision, the supreme court distinguished eminent domain from the exercise of the government's regulatory police power, such as zoning and land use restrictions.[111] During the Survey period, two cases refined what *Diversified Holdings* means in practice.

A. D. Rose, Inc. v. City of Atlanta—For a taking to occur, the challenged regulation must be the only reason the property does not have an

104. *Id.* at 460–61, 850 S.E.2d at 877–78.

105. *Id.* at 457, 850 S.E.2d at 875.

106. For an analysis of *Diversified Holdings* during the 2018 Survey period, *see* Newton M. Galloway & Steven L. Jones, *Zoning and Land Use Law*, *Georgia Survey*, 70 MERCER L. REV. 301 (2018).

107. 302 Ga. at 608, 807 S.E.2d at 886.

108. *Id.* at 606–07, 807 S.E.2d at 885 (first citing Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001); then citing Murr v. Wisconsin, 137 S. Ct. 1933, 1951 (2017); and then citing Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

109. *Id.* at 609–10, 807 S.E.2d at 887.

110. *Id.* at 610, 807 S.E.2d at 887–88.

111. *Id.* at 605–06, 807 S.E.2d at 884–85.

economically viable use.

In *D. Rose Inc. v. City of Atlanta*, D. Rose, Inc. (D. Rose) [112] acquired a 1.17 acre residentially zoned parcel within the City of Atlanta (the City) bisected by a creek. The rear portion of the property was encumbered with a floodplain and sewer easements rendering two thirds of the property unbuildable. Additionally, the applicable zoning district and regulations required a sixty-foot front yard setback. D. Rose sought a variance from the front-yard setback, alleging that the restriction constituted a regulatory taking without just and adequate compensation. The City denied the variance. D. Rose appealed via petition for writ of certiorari. The Fulton Superior Court dismissed the petition. And the Georgia Court of Appeals granted D. Rose's application for discretionary appeal.[113]

The court recited the reasoning of *Diversified Holdings* and its federal muse, *Penn Central Transportation Company v. New York City.*,[114] framing its analysis of the taking claim.[115] The court of appeals then announced a takings analysis must focus on whether the challenged regulation completely deprives the property of all beneficial economic uses.[116] To do so, the court declared that a takings analysis must focus on the "'property as a whole.'"[117] Through this lens, the court found that "[w]hile the setback requirement together with these other encumbrances may effectively deprive [D. Rose] of all use of the property, the setback requirement is not, *by itself*, the reason that *all* of the value of the property's beneficial economic use has been depleted."[118]

Considering *D. Rose*, it is rare that a zoning requirement will amount to a taking of property. This case shows that the predictions after *Diversified Holdings* are true: most owners of property, in Georgia, encumbered by zoning regulations that effectively render their property undevelopable do not have a claim for a regulatory taking. As a result, Georgia property owners are left with appealing denials to superior court. As discussed in previous surveys, the appeal process for legislative decisions (which are all but confined to decisions solely amending a zoning ordinance or rezoning property) and quasi-judicial decisions (generally, all other decisions, such as variances and special use permits

112. 359 Ga. App. 533, 534, 859 S.E.2d 514, 515 (2021).

113. *Id.* at 533–34, 859 S.E.2d at 515.

114. 438 U.S. 104 (1978).

115. *D. Rose,* 359 Ga. App. at 535, 859 S.E.2d at 515–16.

116. *Id.* at 536, 859 S.E.2d at 516–17.

117. *Id.* (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Plan. Agency, 535 U.S. 302, 327 (2002)).

118. *Id.* at 537, 859 S.E.2d at 517.

which are also called conditional use permits) are diametrically different. Appeals of legislative decisions are tried *de novo*. And naturally, quasi-judicial decisions are appealed with the superior court sitting as an appellate court applying a standard that asks whether any evidence supported the local government's decision.

B. Appellate Practice—Clay v. Douglasville-Douglas County Water and Sewer Authority–an inverse condemnation claim in response to a local government's decision on a zoning request is an appeal of a local administrative agency's decision that requires an application for discretionary appeal to the court of appeals.

In *Diversified Holdings*, the Supreme Court of Georgia held that a rezoning application was a "zoning decision" that appellants must appeal to the court of appeals via an application for discretionary appeal under section 56-6-35(a)(1) of the Official Code of Georgia Annotated.[119] But, the court in *Diversified Holdings* made that decision pretermitting whether an appeal from a true inverse condemnation proceeding would require a discretionary application.[120]

In *Clay v. Douglasville-Douglas County Water and Sewer Authority*, the Georgia Court of Appeals held that an inverse condemnation claim asserted against application of a development regulation promulgated by a local water and sewer authority constituted a decision of a local administrative agency.[121] This is similar to a "zoning decision" under *Schumacher v. Roswell*,[122] that can only be appealed to the court of appeals via an application for discretionary appeal under O.C.G.A. § 56-3-35(a)(1).[123]

The test of whether a superior court's order on a local government or authority's decision related to zoning or land use requires an application for discretionary appeal to the court of appeals (on its face) is simple: ask whether the initial decision giving rise to the suit is adjudicative in nature.[124] If the answer is in the affirmative, then an appeal from the superior court's order must be by application for discretionary appeal to the court of appeals; if it is in the negative, the appeal may be direct.[125]

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119. 302 Ga. at 605, 807 S.E.2d at 884.
120. *Id.*
121. 357 Ga. App. 434, 436–37, 848 S.E.2d 733, 736 (2020).
122. 301 Ga. 635, 803 S.E.2d 66 (2017).
123. *Clay*, 357 Ga. App. at 436–37, 848 S.E.2d at 736.
124. *Id.* at 436, 848 S.E.2d at 736.
125. *Id.*

A finding that a decision is adjudicative does not rest on the decision maker's required procedure.[126]

Instead, a decision is adjudicative if it is particular, immediate, and specific in application and involves "assessment of facts about the parties and their activities, businesses, and properties," rather than, as in the case of a legislative or rule making action, general and prospective in effect and "'marked by a general factual inquiry that is not specific to the unique character, activities[,] or circumstances of any particular person[.]'"[127] Thus, if "the [would-be] appellant has already been heard in two tribunals on the relevant issues, once by the [local] administrative agency and once by the superior court," an application for discretionary appeal is required.[128]

The purpose of § 5-6-35 is clear: "'to give the appellate courts the discretion not to entertain an appeal where the superior court had reviewed a decision of certain specified lower tribunals (i.e., two tribunals had already adjudicated the case).'"[129] The treacherous path lies in the way the application for discretionary versus direct appeal (in the court of appeals) test compares with the writ for certiorari versus direct appeal (in superior court) test. In the former instance, a rezoning is "adjudicative" (in other words, quasi-judicial) in nature because it involves a particular piece of property and is prospective in nature.[130] In the latter test, a rezoning decision is legislative in nature because the Georgia Zoning Procedures Law says so.[131] As noted in prior surveys, this is a potential tripwire of which land use and zoning practitioners must be weary.

IV. O.C.G.A. § 32-3-3.2: THE INTERSECTION OF EMINENT DOMAIN AND THE HOME RULE ZONING POWER—UNANSWERED QUESTIONS.

During the 2020 legislative cycle, the Georgia General Assembly passed House Bill 1098, which created a new statute codified at O.C.G.A.

126. *Id.* (citing State v. Int'l Keystone Knights of the Ku Klux Klan, 299 Ga. 392, 401, 788 S.E.2d 455, 463 (2016)).

127. *Id.* (quoting *Int'l Keystone Knights*, 299 Ga. at 401, 788 S.E.2d at 463).

128. *Id.* at 438, 848 S.E.2d at 737 (citing *Diversified Holdings*, 302 Ga. at 603–04, 807 S.E.2d at 883).

129. *Id.* at 438, 848 S.E.2d at 737–38 (quoting Ladzinske v. Allen, 280 Ga. 264, 265, 626 S.E.2d 83, 85 (2006)).

130. *Id.* at 436–37, 848 S.E.2d at 736.

131. *Id.*

§ 32-3-3.2.[132] That statute, which provides as follows, leaves many questions regarding its practical effect unanswered:[133]

> When rights of way or real property or interests therein are acquired or condemned by a state agency, county, or municipality for public road purposes and a documentation of a conflict has been issued to a property owner, the local jurisdiction shall:
>
> (1) Grant a minimum degree of variance from land use or land disturbance permitting standards for the remaining parcel to the property owner or any successor in interest. Such variance shall be granted upon satisfactory production of proof of the transfer of title of the acquired or condemned property or interests in property to the condemning authority and the documentation of a conflict; provided, however, that application for any such variance has been made no later than five years after the transfer of property or interests in property; or
>
> (2) Provide to the property owner or any successor in interest just and adequate compensation for damages related to a conflict with local land use ordinances or regulations as identified by documentation of a conflict and upon denial of a variance sought pursuant to paragraph (1) of this subsection; provided, however, that no compensation shall be paid either directly or indirectly by the acquirer or condemnor.[134]

A "documentation of a conflict" is a document produced by the condemning government or "authority to a property owner revealing a proposed cure for an alleged damage that resulted as part of a condemnation or from acquisition through negotiations . . . [that] would result in a violation of a local government land use ordinance or land disturbance regulation."[135]

The first and most important issue is the conflict between this statute and the home rule zoning power of local governments. Arguably, this statute constitutionally usurps the local zoning power. The Georgia Constitution bestows upon the governing authority of each local government the power to "adopt plans and . . . exercise the power of zoning."[136] Likewise, the General Assembly often reiterates that power

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132. Ga. H.R. Bill 1098, Reg. Sess. (2020) (codified at O.C.G.A. § 32-3-3.2).

133. Christian Torgrimson & Ellen Smith, *New Law Creates Uncertainty for Georgia Property Owners and Local Governments*, DAILY REPORT (Jul. 19, 2021), https://www.law.com/dailyreportonline/2021/07/19/new-law-creates-uncertainty-for-georgia-property-owners-and-local-governments/ (last accessed Aug. 1, 2021).

134. O.C.G.A. § 32-3-3.2(b) (2021).

135. O.C.G.A. § 32-3-3.2(a)(3) (2021).

136. GA. CONST. art. IX, § 2, para. 4.

in municipal charters.[137] Despite this delegation of power, the Georgia Constitution, however, does "not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such [zoning] power."[138]

Procedural laws are different from laws usurping the zoning power of local governments. To that end, the Georgia Supreme Court, when interpreting an analogous constitutional predecessor to Article IX, Section II, Paragraph IV of the Constitution of the State of Georgia of 1983, regarding the home rule power of local governments, declared that "[i]t was the intent of the General Assembly in submitting [to the voters the constitutional] amendment that the legislature, upon its ratification, would no longer have the authority to enact local laws concerning planning and zoning," and that the sole authority to do so would be vested in the local governments of the state.[139]

In contrast to O.C.G.A. § 32-3-3.2, ZPL is a procedural law that governs how local governments must consider certain zoning requests.[140] ZPL requires with respect to those zoning requests (among other things) a public hearing, public notice of that hearing, and an opportunity for the applicant and the public to be heard.[141] ZPL does not bind the local government to take any particular action on any zoning request.[142] For that reason, the Supreme Court of Georgia in *Northridge Community Association, Inc. v. Habersham at Northridge*,[143] held to be permissible a now-repealed zoning procedures law because it was "strictly procedural, neither b[ou]nd the local government in any way nor infringe[d] on its ability to 'exercise the power of zoning[.]' . . . [that law, like ZPL,] therefore . . . d[id] not exceed . . . constitutional authorization."[144]

In contrast, O.C.G.A. § 32-3-3.2 could require a local government to grant a "minimum degree variance" and, therefore, may unconstitutionally infringe on local governments' exclusive ability to exercise the power of zoning.[145] Consequently, the General Assembly, in enacting O.C.G.A. § 32-3-3.2, arguably impermissibly enacted a law

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137. *See* O.C.G.A. §§ 36-35-3(a), 70-3(1)–(3) (2021); *see also, e.g.,* ALPHARETTA, GA., CODE OF ORDINANCES art. I, § 1.13 (2021); 1981 Ga. Laws (Act No. 704), 4609, 4613 (City of Alpharetta, Georgia, City Charter Section 1.13 (14)).

138. GA. CONST. art. IX, § 2, para. 4.

139. Johnston v. Hicks, 225 Ga. 576, 580–81, 170 S.E.2d 410, 413 (1969).

140. *E.g.*, O.C.G.A. § 36-66-4 (2021).

141. *Id.*

142. *See* O.C.G.A. § 36-66-2 (2021).

143. 257 Ga. 722, 363 S.E.2d 251 (1988).

144. *Id.* at 724, 363 S.E.2d at 253.

145. *See id.*

inconsistent with the Georgia Constitution, in violation of Paragraph I, Section VI, Article III of the same constitution.[146]

Additionally, the statute is not clear on what is a "minimum degree variance."[147] For example, if a documentation of a conflict shows that a complete variance must be granted (in other words, that the requirement under the applicable zoning or development ordinance must be completely, as opposed to partially, eliminated for the subject property), then is that a "minimum degree variance"? Or does the statute seek to limit the degree of variance that must be granted so that local governments can retain the spirit of the regulation sought to be varied?

The statute may also create conflicts between different departments, boards, or commissions within a local government if the local government is both the condemning or acquiring entity and the local government vested with the zoning power.[148] Additionally, many property owners may have prepared plans showing cures from takings or acquisitions and claim that they constitute "documentation[s] of a conflict."[149] The plain language of the statute appears to indicate that under such a scenario an owner-produced documentation would not suffice to trigger application of O.C.G.A. § 32-3-3.2, but the question remains.[150] Does the word "degree" prevent a local government from granting a "minimum degree variance" subject to conditions of approval? If an ordinance does not have an explicit variance provision regarding the conflicting regulation, does the statute empower a local government to grant what in other circumstances would be a procedurally improper variance? And, if the local government refuses to grant a "minimum degree variance", what action does the applicant file to force the local government to pay "just and adequate compensation"? One thing is for certain: litigation will abound over O.C.G.A. § 32-3-3.2.

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146. GA. CONST. art. III, § 6, para. 1 ("The General Assembly shall have the power to make all laws not inconsistent with this Constitution . . . .").

147. O.C.G.A. § 32-3-3.2.

148. *See* Torgrimson & Smith, *supra* note 133.

149. *See* Ga. H.R. Bill 1098, *supra* note 132.

150. *See* Torgrimson & Smith, *supra* note 133.