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Zoning and Land Use

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Since 2017,[1] this Georgia Survey of zoning law has annually chronicled judicial decisions transforming legislative zoning decisions into quasi-judicial actions, starting with *City of Cumming v. Flowers*,[2] which held that a local government decision on a variance is quasi-judicial and may only be appealed by writ of certiorari.[3] Subsequently, the Georgia Court of Appeals in *York v. Athens College of Ministry*[4] held that consideration of a special/conditional use permit is also a quasi-judicial decision, thus extending the holding of *City of Cumming*.[5] Though the appeal of a zoning decision has traditionally been *de novo*, *York* prohibited parties from raising, for the first time, issues in superior court

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1. For information concerning the prior survey period, *see* Newton M. Galloway & Steven L. Jones, *Zoning and Land Use Law*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 329 (2021), https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=2710&context=jour_mlr [https://perma.cc/M5JM-RGWX].

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

3. *Id.* at 822, 797 S.E.2d at 850 ("This Court clearly held—for the first time—that a zoning variance decision was quasi-judicial and thus subject to certiorari review under O.C.G.A. § 5-4-1(a)."); *see* O.C.G.A. § 5-4-1(a) (2022).

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

5. *Id.* at 58, 821 S.E.2d at 122; *see also Flowers*, 300 Ga. at 822, 797 S.E.2d at 850.

that were not presented to the local government during the hearing on the application for a quasi-judicial decision.[6] *York* applied the "any evidence" standard of review for factual issues—akin to that under the Georgia Administrative Procedure Act[7]—to appeals of local government zoning decisions.[8]

Decisions in cases that followed moved the transformation forward, but no opinion crossed the Rubicon to finally hold that a local government's decision on a rezoning application is a quasi-judicial, rather than legislative, decision.[9] Last year's survey noted that "[t]he 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."[10] No definitive opinion was issued in the current Survey period. The issue of whether a legislative rezoning decision will be transformed into a quasi-judicial decision remains unresolved, but an amendment to Georgia's Zoning Procedures Law (ZPL) provides some clarity.[11]

Significant developments in Georgia zoning law during this Survey period came from legislative bodies—state and local—rather than the courts. The Georgia General Assembly enacted significant revisions to ZPL,[12] which will impact all local government zoning decisions prospectively.[13] The legislature also enacted the Superior and State Court Appellate Practice Act (SSAPA) to be codified at Official Code of Georgia Annotated title 5, chapter 3[14] and replace the arcane and antiquated writ of certiorari to superior court appeal procedure. The new appeal procedure set forth in ZPL and SSAPA may render the issue of whether a rezoning decision is legislative or quasi-judicial moot.

Additionally, in local legislation, the City of Atlanta (Atlanta), following legislative precedents in Oregon[15] and California,[16] proposed zoning ordinance amendments to substantially change the traditional bedrock of residential zoning: single-family residential zoning districts.[17] Ostensibly to promote workforce housing affordability and housing diversity, Atlanta proposed ordinances to increase residential density in

6. *York*, 348 Ga. App. at 59–60, 821 S.E.2d at 123.
7. O.C.G.A. tit. 50, ch. 13 (2022).
8. *York*, 348 Ga. App. at 64, 821 S.E.2d at 125.
9. *See generally* Galloway & Jones, *Zoning & Land Use*, 73 MERCER L. REV. 329.
10. *Id.* at 329.
11. O.C.G.A. tit. 36, ch. 66 (2022).
12. Id.
13. Ga. H.R. Bill 1405, Reg. Sess., 2022 Ga. Laws 825.
14. Ga. H.R. Bill 916, Reg. Sess., 2022 Ga. Laws 767 (effective July 1, 2023).
15. Or. H.R. 2001, Reg. Sess. (2021).
16. Ca. S.B. 9, Reg Sess. (2021).
17. Atlanta, Ga., Proposed Ordinance 21-O-0456 (Oct. 1, 2021).

urban areas located near transit stations and allow additional dwellings on lots zoned only for single-family dwellings, as a matter of right.[18] Simultaneously, rezoning actions were initiated to eliminate certain single-family zoning districts in prime Atlanta neighborhoods—Midtown and Ansley Park among them.[19]

The Georgia legislature responded with provisions in the amendment to ZPL to support single-family zoning districts and make it harder for local governments to change their character.[20] Specifically, it imposed significant additional procedural restrictions and delayed local governments' consideration of dramatic changes to or elimination of traditional single-family zoning districts.[21]

Though not as significant in this Survey period, recent court opinions are also reviewed in this Article.

I. LEGISLATIVE CHANGES DURING THE SURVEY PERIOD

In the 2021–2022 legislative cycle, the Georgia General Assembly enacted House Bill (H.B.) 1405,[22] which overhauled ZPL. H.B. 1405 resolved many issues addressed in this Article during prior survey periods. However, H.B. 1405 also left many questions unanswered and created a few more questions.

During the Survey period, the General Assembly also enacted H.B. 916,[23] the SSAPA, which repealed the archaic Chapters Three and Four under Title Five of the Official Code of Georgia Annotated: the writ of certiorari to superior court[24] and appeals to superior and state court scheme.[25] The SSAPA replaced them with a new chapter and scheme for appeals to Georgia's superior and state courts.[26] The SSAPA is not effective until July 1, 2023.[27] Until then, appeals will continue to proceed under the old appellate scheme.

A. Overhaul of Georgia's Zoning Procedures Law

The purpose of ZPL is to establish minimum procedures governing

18. Id.

19. Atlanta, Ga., Ordinance 21-O-0456 (Z-21-74) § 1.

20. Ga. H.R. Bill 1405, 2022 Ga. Laws 825.

21. Id.

22. Ga. H.R. Bill 1405, 2022 Ga. Laws 825. The Act also fixed the awkward title of ZPL by dropping the capitalized "The" from the law's title.

23. Ga. H.R. Bill 916, 2022 Ga. Laws 767.

24. O.C.G.A. tit. 5 ch. 4 (1983).

25. O.C.G.A. tit. 5 ch. 3 (1983).

26. Ga. H.R. Bill 916, 2022 Ga. Laws 767.

27. Id.

local governments' exercise of their zoning powers within their respective territorial boundaries and provide due process to the general public in relation to the regulation of property by local governments.[28] H.B. 1405 seeks to establish and clarify the "means of judicial review of the exercise of [local governments' zoning] power" based on whether the power exercised was legislative or quasi-judicial.[29] Prior to H.B. 1405, ZPL did not establish minimum procedures for or limitations on the quasi-judicial zoning powers of local governments or define or recognize the existence of quasi-judicial agencies. Instead, its definitional provision purported only to regulate legislative zoning decisions.[30] Nonetheless, as discussed in prior surveys, the line between quasi-judicial and legislative decision, as well as the appellate path for each, was—and may still be—very blurred.

ZPL, now, as amended by H.B. 1405, defines a "quasi-judicial officer[], board[], or agenc[y]" as:

> an officer, board, or agency appointed by a local government to exercise delegated, quasi-judicial zoning powers including hearing appeals of administrative decisions by such officers, boards, or agencies and hearing and rendering decisions on applications for variances, special administrative permits, special exceptions, conditional use permits, or other similar permits not enumerated herein as a zoning decision, pursuant to standards for the exercise of such quasi-judicial authority adopted by a local government.[31]

As ZPL always did for legislative decisions, H.B. 1405 also requires local governments to adopt policies and procedures governing hearings on quasi-judicial decisions.[32]

Further refining definitions, H.B. 1405 clarifies that the definition of "zoning decision" includes the adoption and now the repeal of a zoning ordinance.[33] Additionally, the definition of "zoning decision" also includes the adoption and now the denial of: a rezoning request (including one related to property to be annexed by a municipality); "a permit relating to a special use of property"; and a variance "or conditions" heard

28. O.C.G.A. § 36-66-2(a) (2022).
29. Ga. H.R. Bill 1405, 2022 Ga. Laws 825.
30. O.C.G.A. § 36-66-3 (2022).
31. O.C.G.A. § 36-66-3(1.1).
32. Ga. H.R. Bill 1405, 2022 Ga. Laws 825.
33. Id.

"concurrent and in conjunction with" a rezoning or special use permit.[34] Previously, it was questionable whether a denial of a rezoning request or "a permit relating to a special use of property" was a zoning decision.

This new definition creates new uncertainty because a variance traditionally has been quasi-judicial, but now, if it is heard "concurrently and in conjunction" with a zoning decision, it is, by statute, legislative. Courts will have to decide when a variance is heard in such circumstances. For instance, if applications for a rezoning or special use permit and a concurrent variance are filed simultaneously, but the local government decides them at different times because one application is tabled or an inferior board is vested with the power to decide the variance, has the variance been decided concurrent with the zoning decision so as to make the decision on the variance legislative? Additionally, if a concurrent variance is legislative, can it be heard by a "quasi-judicial officer[], board[], or agenc[y]" because a governing authority cannot delegate its legislative power? H.B. 1405 also left open the question, discussed in previous surveys, of the definition or scope of "a permit relating to a special use of property," which ZPL has historically included within the definition of a legislative zoning decision, even though ZPL now, as amended, defines a quasi-judicial entity to include one that makes decisions on (among other things) special exceptions and conditional use permits. Finally, the statute leaves open whether a zoning decision includes a decision which zones property for the first time, as some local governments in Georgia remain without a zoning ordinance.

As discussed later in this Article, H.B. 1405 also creates certain special, minimum procedural requirements where: (1) "a proposed zoning decision relates to an amendment of the [local government's] zoning ordinance to revise one or more zoning classifications or definitions related to single-family residential uses of property so as to authorize multifamily uses of property . . ."; or (2) "grant blanket permission, under certain or all circumstances, for property owners to deviate from the existing zoning requirements of a single-family residential zoning."[35] The minimum procedures require that within a period of twenty-one days, the zoning decision must "be adopted at two regular meetings of the local government making the zoning decision."[36] Prior to the first regular meeting, there must be at least two public hearings regarding the

34. O.C.G.A. §§ 36-66-3(4)(A), (4)(E), (4)(F). Georgia courts will have to decide whether the word "conditions" in this context refers to conditions imposed on a legislative zoning decision or something else.

35. O.C.G.A. § 36-66-4(h)(1).

36. O.C.G.A. § 36-66-4(h)(1)(A).

proposed action. Those public hearings must be held three to nine months prior to the date of final action, and one of the hearings must occur between the hours of 5:00 PM and 8:00 PM.[37] In addition to the public hearings, a notice must be posted on each affected property and published in a newspaper of general circulation in the territorial boundaries of the local government within fifteen to forty-five days of each hearing.[38]

As it always had for legislative zoning decisions, ZPL now requires local governments to adopt minimum policies and procedures relating to hearings on "quasi-judicial matter[s]," an undefined term, before a quasi-judicial officer, board, or agency (as defined in O.C.G.A. § 36-66-3(1.1)) to which a local government has delegated quasi-judicial decision-making power.[39] Additionally, as with zoning decisions made by a local government's governing body, a public hearing, and advance public notice of such hearing, are required for quasi-judicial decisions made by a quasi-judicial agent.[40] For these quasi-judicial matters, ZPL now permits (but does not require) local governments to adopt "specific standards and criteria governing the exercise of such quasi-judicial decision-making authority," and, if adopted, those standards must include "factors by which the local government directs the evaluation of a quasi-judicial matter."[41]

This strange dichotomy raises many issues. First, ZPL now does not address instances when the local government's governing authority retains the power to make a decision on a variance, rather than, as is often the case, such power is delegated to an inferior entity. Second, ZPL requires standards governing legislative zoning decisions but only permits, though not requiring, such standards for quasi-judicial decisions. That is backwards. Historically, Georgia courts have determined whether a decision is quasi-judicial based, in part, on whether the decision was "tightly controlled by the ordinance."[42] On the other hand, local governments can now make quasi-judicial zoning decisions that do not fit the caselaw definition of the same while simultaneously making legislative ZPL decisions that are "tightly controlled by the ordinance."[43]

37. O.C.G.A. § 36-66-4(h)(1)(B).
38. O.C.G.A. § 36-66-4(h)(1)(B)(i)–(ii).
39. O.C.G.A. § 36-66-5(a) (2022).
40. O.C.G.A. § 36-66-4(g) (2022).
41. O.C.G.A. § 36-66-5(b.1).
42. *Flowers*, 300 Ga. at 824, 797 S.E.2d at 851.
43. Id.

H.B. 1405 further creates certain judicial mechanisms to ensure the general public is not denied due process when petitioning "the courts for review of a local government's exercise of zoning, administrative, or quasi-judicial powers."[44] H.B. 1405 permits the superior court located in the county of the affected property to review both legislative zoning decisions and quasi-judicial zoning decisions.[45]

The amendment to ZPL clarifies that legislative zoning decisions are:

> subject to direct constitutional [and *de novo*] challenge[s] [seeking declaratory and injunctive relief and] regarding the validity of maintaining the existing zoning on the subject property or the validity of conditions or an interim zoning category other than what was requested in the superior court pursuant to its original jurisdiction over declaratory judgments.[46]

For challenges to legislative zoning decisions, and consistent with long-standing Georgia zoning jurisprudence, it is presumed "that a governmental zoning decision is valid and can be overcome substantively by a petitioner showing by clear and convincing evidence that the zoning classification is a significant detriment to the petitioner and is insubstantially related to the public health, safety, morality, or general welfare."[47] Finally, the amendment to ZPL further provides that such an appeal shall "bring[] up the whole record from the local government [but] all competent evidence shall be admissible," regardless of whether such evidence was presented to the local government.[48]

Similar to the (soon to be) repealed writ of certiorari to superior court statutory scheme, appeals of quasi-judicial decisions and variances that are legislative zoning decisions because they are heard "concurrent[ly] and in conjunction with" another zoning decision are subject to an on the record appeal under the SSAPA.[49]

Both challenges to legislative and quasi-judicial zoning decisions must be challenged within thirty days of such decision.[50] An appeal or challenge filed by an opponent stays all legal proceedings in furtherance

44. O.C.G.A. § 36-66-5.1(a) (2022).
45. O.C.G.A. § 36-66-5.1(a)(2).
46. O.C.G.A. § 36-66-5.1(a)(1).
47. Id.
48. Id.
49. O.C.G.A. § 36-66-3(4)(F).
50. O.C.G.A. § 36-66-5.1(b).

of a legislative or quasi-judicial zoning decision, unless such "a stay would cause imminent peril to life or property."[51]

This appeal dichotomy fixes the misconception arising from *Diversified Holdings, LLP v. City of Suwanee*[52] that the test thereunder for legislative and quasi-judicial decisions—which only applies when analyzing whether a superior court order on the same is appealed by application for discretionary appeal or direct appeal—rendered zoning decisions quasi-judicial for the purposes of determining whether to initially appeal that decision to the superior court by direct appeal (i.e., a declaratory judgment action) or petition for writ of certiorari.[53] However, the definitional ambiguity noted above will breed litigation and need for clarification on appeal, when, in these gray areas, litigants make judgment calls as to what is a legislative zoning decision and what is a quasi-judicial decision.

To prevent the procedural difficulties of the writ of certiorari process, H.B. 1405 establishes certain requirements which each local government must take to ensure that citizens are not "unnecessarily burdened by the review process as a mechanism."[54] First, local governments must designate an authorizing officer of a quasi-judicial board or agency to have the power to "approve or issue any form or certificate necessary to perfect the petition" required by the SSAPA and to be served and accept service on behalf of the quasi-judicial board for the appeal during normal business hours at the local government's regular offices.[55] Second, local governments must designate an elected official, or their designee, who has "authority to accept service and upon whom service of an appeal of a quasi-judicial decision may be effected or accepted on behalf of the local governing authority, during normal business hours, at the regular offices of the local government."[56]

H.B. 1405 provides local governments with an implementation period stating that it "shall [not] be construed to invalidate any zoning decision made by a local government prior to July 1, 2023."[57] Clearly, practitioners and local governments may need time to digest and implement this new procedural framework.

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51. O.C.G.A. § 36-66-5.1(d).
52. 302 Ga. 597, 807 S.E.2d 876 (2017).
53. *Id.* at 601, 807 S.E.2d at 882.
54. O.C.G.A. § 36-66-5.1(c).
55. O.C.G.A. § 36-66-5.1(c)(1).
56. O.C.G.A. § 36-66-5.1(c)(2).
57. O.C.G.A. § 36-66-2(a).

B. H.B. 916—the SSAPA—Elimination of the Petition for Writ of Certiorari to Superior Court.

The General Assembly, during the Survey period, also enacted H.B. 916, which repealed chapters in title 5 of the Official Code of Georgia Annotated relating to certiorari and appeals to superior and state courts.[58] The SSAPA could be the subject of its own article addressing its procedure and unanswered questions stemming therefrom. The SSAPA affects many areas of law, not just zoning. Consistent with its purview, this Article will only discuss the effect the SSAPA has on zoning practitioners.

Under the old scheme "many appeals from a lower judicatory to a superior or state court could result in a dismissal on complex procedural grounds and not a decision on the merits." [59] In enacting the SSAPA, the General Assembly sought to "[p]rovide a single, modern, and uniform procedure called 'a petition for review' for appealing a decision made by a lower judicatory to a superior or state court." [60] Likewise, the General Assembly instructed courts to "[c]onstrue the provisions of th[e] [SSAPA] broadly so as to render decisions based on the merits of each case and avoid dismissal" solely on procedural grounds.[61]

The amendment to ZPL notes that with respect to zoning the SSAPA only applies to quasi-judicial decisions.[62] Consistent with other appellate standards, an appeal may only be brought after "all appeals or administrative remedies available in the lower judic[iary]" have been exhausted.[63]

The SSAPA creates a new pleading—the "Petition for Review"—which is:

> any request for review of a final judgment filed in a [superior or state] court by a petitioner, including, but not limited to, any request for review formerly titled as a petition for writ of certiorari, petition for writ of mandamus, petition for writ of prohibition, or notice of appeal.[64]

The SSAPA sets out the substantive requirements for such a petition and provides that any deficiencies are amendable defects, a saving grace that

58. Ga. H.R. Bill 916, 2022 Ga. Laws 767.
59. *Id.* at § 5-3-2(a)–(b).
60. *Id.*
61. *Id.* at § 5-3-2(c)(1).
62. *Id.* at § 5-3-3(3).
63. *Id.* at § 5-3-3(4)(A).
64. *Id.* at § 5-3-3(9).

was not available for all defects under the prior certiorari to superior court statutory scheme.[65] Consistent with the overturning of the local ordinance requirement in *Flowers*, the SSAPA provides that it "preempt[s] any local law or any locally enacted law, ordinance, regulation, rule, or procedure in conflict with [the SSAPA]."[66] In such cases, the "respondent" is the person or entity that is adverse to the petitioner filing the petition for review; however, "[i]f there is no party adverse to the petitioner, the respondent shall be" the county or municipality itself.[67]

Similar to the writ of certiorari procedure it replaced and caselaw thereunder, the SSAPA provides that an appeal must be filed within "30 days after the final judgment of the lower judic[iary]," and the reviewing court shall:

> (1) Review only matters raised in the record of the proceeding in the lower judici[ary];
> (2) Accept the findings of fact and credibility of the lower judic[iary] unless they are clearly erroneous;
> (3) Accept a decision regarding an issue within the sound discretion of the lower judic[iary] unless such a decision was an abuse of discretion;
> (4) Determine whether the final judgment was sustained by substantial evidence; and
> (5) Review questions of law de novo.[68]

Under the writ of certiorari scheme, the term "substantial evidence" was interpreted to mean "any evidence."[69] "Sufficient evidence" is not defined by the SSAPA. Certainly, this term of art will spur litigation and the need for appellate decisions as to the boundaries of what is and what is not sufficient evidence. However, unlike its predecessor, the SSAPA is very forgiving. Many defects are curable, and the petition is amendable until a hearing is held or a pretrial order is entered.[70] Likewise, the circumstances in which an appellate court is authorized to dismiss the petition are limited to when: (1) the petition was untimely filed; (2) the court lacks jurisdiction; (3) the question presented is moot; (4) there is no justiciable controversy; (5) the petitioner does not prosecute the appeal;

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65. *Id.* at § 5-3-7(e)–(f).

66. *Id.* at § 5-3-4(c); *see also Flowers*, 300 Ga. at 822, 797 S.E.2d at 850.

67. Ga. H.R. Bill 916, 2022 Ga. Laws 767 § 5-3-3(11).

68. *Id.* at §§ 5-3-5(a), 5-3-7(b).

69. Milani v. Irwin, 354 Ga. App. 218, 218, 840 S.E.2d 700, 702 (2020) (citing City of Dunwoody v. Discovery Practice Mgmt., 338 Ga. App. 135, 138, 789 S.E.2d 386 (2016)).

70. *E.g.*, Ga. H.R. Bill 916, 2022 Ga. Laws 767 §§ 5-3-7(d), 5-3-12(b)–(d).

or (6) the petitioner does not comply with the SSAPA or any court rule or order.[71]

Additionally, the SSAPA provides that a judgment is not final nor appealable unless it is either "(1) [s]igned and notice of the [same] . . . has been provided to all the parties, if the lower judicatory does not have a clerk;" or "(2) [f]iled or recorded, whichever first occurs, if the lower judicatory has a clerk."[72] Most (if not all) Georgia local governments have a clerk. Therefore, litigants will debate when a local government's decision on a zoning or other matter is "filed or recorded."[73] That phrase could mean that the decision must first be reduced to minutes, those minutes approved, and included in the local government's minute book. Alternatively, it could relate to when the local government's planning and zoning staff has reduced the decision to a decision letter.

The SSAPA further sets out specific requirements for service, pleading, case management, preservation, and transmission to the reviewing court of the record below.[74] Many of those specific provisions are beyond the scope of this Article. Regarding the record below—in addition to numerous other provisions governing preservation and transmission of the record below to the reviewing court—SSAPA requires that a transcript of the evidence and proceedings below must be prepared, and if a transcript was not prepared below, "the petitioner [must] prepare a transcript at the petitioner's expense from recollection [which may be in narrative form] or otherwise [but] only if the petitioner is financially able."[75] All parties must agree to the transcript, or the reviewing court will decide which party's transcript is correct, and the reviewing court's decision "is final and not subject to review."[76] To that end, "[t]he lower judic[iary] may transmit a supplemental record to the reviewing court[,]" and if the lower judiciary does not permit a party to include a document in the record that party may supplement the record with a "notation of the lower judic[iary]'s disallowance."[77] Alternatively, "[i]f all parties agree, in lieu of a transcript of the evidence and proceedings in the lower judic[iary], they may file in the lower judic[iary] a stipulation of the case showing how the question under review arose and was decided along with a statement of facts."[78] The reviewing court,

71. *Id.* at § 5-3-12.
72. *Id.* at § 5-3-7(b).
73. *Id.* at § 5-3-7(b)(2).
74. *Id.* at §§ 5-3-7 through 5-3-14.
75. *Id.* at § 5-3-14(b).
76. *Id.* at § 5-3-14(l).
77. *Id.* at §§ 5-3-14(n), (p).
78. *Id.* at § 5-3-14(q).

after reviewing the petition and record, shall, in a written order, either enter judgment on the petition, dismiss the petition, remand the petition with instructions, or a combination of these options.[79]

II. APPELLATE DECISIONS DURING THE SURVEY PERIOD

During the Survey period, unlike prior years, Georgia's appellate courts were relatively inactive in the area of zoning. Alas, a break! And, of the few noteworthy decisions, some were rendered bad law by legislative changes. Many decisions during the Survey period addressed issues of immunity, which are still abound with a lack of clarity. Those decisions are slightly beyond the scope of this Article. However, zoning litigators should take note of those decisions which (like the constitutional amendment discussed in last year's article)[80] must be carefully analyzed when naming parties.[81]

In *IDI Logistics, LLC v. City of Douglasville*,[82] the Supreme Court of Georgia implied that it might find that a rezoning is definitely a legislative decision which must be appealed by a direct, *de novo* appeal to superior court.[83] But, it stopped short because IDI Logistics, LLC (IDI) did not preserve that issue for appeal. There, IDI, presuming that a rezoning is a quasi-judicial decision, under *Diversified*, appealed denial of a rezoning application by writ of certiorari, under the Official Code of Georgia Annotated section 5-4-1, which is the certiorari to superior court scheme replead by the SSAPA.[84] The Superior Court of Douglas County agreed to dismiss the petition on the merits, and IDI filed an application for discretionary appeal.[85] The supreme court denied the application.[86] However, Justice Warren, in a concurring opinion, noted: "I am less certain of what IDI assumes here: [perhaps] that a party challenging the

79. *Id.* at § 5-3-18.

80. *See generally* Galloway & Jones, *Zoning & Land Use*, 73 MERCER L. REV. 329.

81. Young v. Johnson, 359 Ga. App. 769, 860 S.E.2d 82 (2021) (holding that a complaint was properly dismissed because the plaintiff did not allege a waiver of sovereign immunity in her complaint or an amended complaint); City of Alpharetta v. Vlass, 360 Ga. App. 432, 861 S.E.2d 249 (2021) (discussing municipal waivers of sovereign immunity with respect to nuisances); Spann v. Davis, 355 Ga. App. 673, 845 S.E.2d 415 (2021) (discussing judicial immunity); Small v. Chatham Cnty., 360 Ga. App. 500, 861 S.E.2d 437 (2021) (discussing sovereign immunity); Parr v. Cook Cnty. Sch. Dist., 359 Ga. App. 823, 860 S.E.2d 114 (2021) (discussing sovereign and official/qualified immunity).

82. 312 Ga. 288, 862 S.E.2d 324 (2021).

83. *Id.* at 289, 862 S.E.2d at 325.

84. *Id.*; *see also* O.C.G.A. § 5-4-1 (2022).

85. *IDI Logistics*, 312 Ga. at 288, 862 S.E.2d at 325.

86. Id.

denial of a rezoning application must, in all instances, file its suit as a petition for certiorari to the superior court."[87]

Similarly, in *Gastel v. DeKalb County*,[88] which upon completion of this Article is pending review by the Supreme Court of Georgia, the Georgia Court of Appeals similarly sidestepped deciding the issue of whether a rezoning is a quasi-judicial or legislative decision.[89] There, an applicant appealed denial of a rezoning by an action seeking declaratory and injunctive relief and asserting constitutional claims.[90] Because the Superior Court of Dekalb County characterized the applicant's causes of action as seeking a mandamus, the court of appeals refused to opine on the legislative or quasi-judicial classification of a rezoning action and, instead, remanded the case to the trial court.[91]

In *Brown v. Carson*,[92] the supreme court addressed the doctrine of vested rights developed under a historical land use or zoning ordinance.[93] There, a developer, prior to acquiring a property, met with the director of a local government's zoning department to discuss the developer's intended use of the property—a single-family residential subdivision with the minimum sized lots then allowed in the applicable zoning district under the local government's zoning ordinance. Subsequently, the developer acquired the property and then, the local government amended its zoning ordinance to substantially increase the minimum lot size. The developer applied to the local government for a determination of whether it had vested rights to develop its subdivision under the smaller minimum lot size. The county attorney issued a decision finding that the developer did not have vested rights. The developer appealed to, and the county attorney's decision was upheld by, the local government's zoning appeals board and the Superior Court of Forsyth County.[94]

On appeal, the supreme court started by restating that there are:

> four different scenarios wherein a landowner c[an] acquire a vested right to initiate a specific use of a property despite a change in zoning laws. Those instances are when the landowner relies upon (1) issued building and other permits, (2) the law in existence at the time a landowner properly files an application for a permit, (3) formally and

87. Id.
88. 360 Ga. App. 449, 861 S.E.2d 434 (2021).
89. *Id.* at 451, 861 S.E.2d at 436.
90. *Id.* at 449, 861 S.E.2d at 435.
91. *Id.* at 451, 861 S.E.2d at 436.
92. 313 Ga. 621, 872 S.E.2d 695 (2022).
93. *Id.* at 621, 872 S.E.2d at 696.
94. *Id.* at 622, 872 S.E.2d at 697.

> informally approved development plans, or (4) official assurance that a building permit will probably issue.[95]

In cases involving the last test such as *Brown*, the court must determine whether the person claiming vested rights "'ma[de] a substantial change in position by expenditures in reliance upon *the probability* of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials.'"[96] Applying the last test to the instant case, the court concluded that the developer did not have vested rights to develop its property with the smaller minimum lot size because the director's "words were 'no more than a neutral statement of the present zoning in effect, a fact that [the developer] could easily [have] obtain[ed] himself by consulting the property records.'"[97]

III. ELIMINATION OF THE SINGLE-FAMILY ZONING DISTRICT?

Since the end of World War II, home ownership by America's middle class gave families the ability to own their own "castle," accrue equity in a major (usually) appreciating asset, and achieve financial independence.[98] Before World War II, the country was not suburbanized. Zoning ordinances were still new, having only recently been upheld as an appropriate exercise of local government police power in *Euclid v. Amber Realty Co.*,[99] fourteen years earlier. Many jurisdictions still did not even have zoning regulations.

After the war, suburban neighborhoods of single-family homes developed with the aid of multi-lane highway construction to allow (now ubiquitous) automobiles to facilitate daily commutes from suburb to town.[100] Single-family zoning districts were enacted to protect suburban neighborhoods from encroaching dense residential and commercial

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95. *Id.* at 623–24, 872 S.E.2d at 697.

96. *Id.* at 623, 872 S.E.2d at 697–98 (quoting Cohn Cmtys. v. Clayton Cnty., 257 Ga. 357, 358, 359 S.E.2d 887, 889 (1987)).

97. *Brown*, 313 Ga. at 621, 872 S.E.2d at 696 (quoting *Cohn*, 257 Ga. at 359, 359 S.E.2d at 889).

98. Becky Nicolaides & Andrew Wiese, *Suburbanization in the United States After 1945*, OXFORDRE (Apr. 26, 2017), https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-64 [https://perma.cc/LY8M-GPT5].

99. 272 U.S. 365 (1926).

100. Alexander Von Hoffman, *Single-Family Zoning: Can History Be Reversed?* Joint Center for Housing Studies, HARVARD UNIV. (Oct. 5, 2021), https://www.jchs.harvard.edu/blog/single-family-zoning-can-history-be-reversed.

development. Connectivity between in town neighborhoods was replaced by the isolated suburban cul-de-sac.[101]

Single-family zoning districts usually limited development to one residential dwelling as a principal use per lot, with additional limitations restricting accessory uses and structures.[102] Required lot sizes in single-family zoning districts varied depending on the availability of public water and sanitary sewer, often requiring at least an acre of land for each dwelling where public sanitary sewer service was not available. Required setbacks on front, rear, and side yards of each lot separated the houses. Over time, these restrictions grew, as did the required minimum house size. Single-family residential zoning districts became the development standard for new suburban, residential development.[103]

Recently, single-family zoning district restrictions have become the subject of significant criticism.[104] They have been (at least partly) blamed for a number of societal ills: suburban sprawl, reduction of greenspace, racial segregation in housing, and—most importantly for the purposes of this Article—the affordable housing crisis.[105] Critics argue that the restrictive development criteria imposed by single-family zoning districts discourage efficient and economic property development because their larger lot and minimum house size requirements increase the price of housing beyond the reach of a large segment of the working population. Increased development costs post-COVID help fuel this argument. These criticisms prompted controversial proposals to modify or entirely eliminate single-family zoning districts in places like Oregon and California, and they made their way from the West Coast to Atlanta in 2021.[106]

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101. Id.

102. Id.

103. *See* Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, THE NEW YORK TIMES (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [https://perma.cc/8Z6X-PYEV].

104. *E.g.,* John Infranca, *Singling Out Single Family Zoning*, 111 GEORGETOWN L.J. (March 23, 2022).

105. Infranca, *supra* note 103.

106. *E.g., One Atlanta: Housing Affordability Action Plan*, CITY OF ATLANTA (June 2019), https://www.atlantaga.gov/home/showpublisheddocument/42220/636954406698800000 [https://perma.cc/54L6-R9WV].

A. California's Legislative Precedent

In 2021, California[107] enacted the "Housing Opportunity and More Efficiency Act" (the HOME Act).[108] Because of similarities between Atlanta's proposed ordinances and the HOME Act and their simultaneous development, it is likely Atlanta was directly influenced by California's proceedings. The HOME Act was introduced on December 7, 2020, by California State Senator Toni Atkins,[109] so that "more families can [] pursue their version of the California dream."[110] Designated as Senate Bill 9 (S.B. 9),[111] the HOME Act was championed by housing advocates as a way to address the state's housing shortage, the affordability crisis, and homelessness.[112] S.B. 9 was preceded by a symbolic enactment by the City of Berkeley (Berkeley) to allow multi-unit "equitable neighborhood scale housing" in single-family zoning districts.[113] One commentator asserted that S.B. 9 would encourage architectural and density diversity in existing neighborhoods.[114]

There was significant opposition to S.B. 9 from housing justice advocates, local governments, and homeowner associations.[115] S.B. 9 was

107. Oregon, not California, was actually the first state to substantially modify single-family zoning districts. Laura Wamsley, *Oregon Legislature Votes To Essentially Ban Single-Family Zoning*, NPR (July 1, 2019), https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning [https://perma.cc/54L6-R9WV].

108. Ca. S.B. 9, Reg. Sess.

109. President pro tempore of the California Senate.

110. Jane Northrop, *Housing bill SB 9 Passes Over City Objections*, PACIFICA TRIBUNE (Aug. 31, 2019), https://www.pacificatribune.com/news/housing-bill-sb-9-passes-over-city-objections/article_4f383252-0aa1-11ec-9251-ff54b1c18e2d.html [https://perma.cc/8SEE-LH7Q].

111. Ca. S.B. 9, Reg. Sess. Senate Bill 10, a companion statute to S.B. 9, proposed density increases of "up to 10 units of residential density per parcel" if located in a "transit-rich area" or "urban infill site." Ca. S.B. 10, Reg. Sess. (2021). This bill did not specifically address single-family residential zoning districts, and it is not discussed in this Article.

112. Ca. S.B. 9, Reg. Sess.

113. Nico Savidge, *New State Law SB9 Could Shape Berkley's Effort to End Single-Family Zoning*, BERKLEYSIDE (Sept. 9, 2021), https://www.berkeleyside.org/2021/09/29/sb9-berkeley-single-family-zoning-gavin-newsom [https://perma.cc/9Z3S-Z83U]. Berkeley is credited with enacting the first single-family zoning restrictions in 1916 as a means of racial exclusion.

114. Travis Close & Vanessa Boehm, *Pass the California Home Act (SB 9) for More Beautiful Neighborhoods*, BERKLEYSIDE (Nov. 8, 2021), https://www.berkeleyside.org/2021/08/11/opinion-pass-the-california-home-act-sb9 [https://perma.cc/9ZS2-9WTR].

115. Ged Kenslea, *SB 9 & 10 Polling: California Voters Strongly Oppose 2 Housing Bills*, BUSINESS WIRE (Aug. 9, 2021), https://www.businesswire.com/news/home/20210809005634

criticized for its failure to require affordable housing units or provide housing for the homeless; it was criticized as fuel for gentrification, causing a negative impact on communities of color and the working class seeking to build equity and wealth through home ownership.[116] Opponents viewed S.B. 9 as "yet another multi-billion-dollar giveaway to deep-pocketed real estate interests."[117] S.B. 9 was not popular: in a research poll 67% of respondents opposed the removal of single-family homes while 70% of respondents felt that it would negatively impact homeowners.[118] Despite opposition, S.B. 9 passed on August 26, 2021.[119]

Technically, S.B. 9 did not eliminate single-family zoning districts.[120] Rather, S.B. 9 requires only ministerial review to divide a lot zoned for a single-family dwelling into at least two separate lots on which two duplex dwellings can be constructed on each.[121] Also, with only ministerial review, it requires approval of a parcel map, which splits an urban lot into two or more separate lots to construct two duplex dwellings on each.[122]

S.B. 9 requires that the lot: (a) must be located in a city in an "urbanized area" or "urban cluster" designated by the Census Bureau;[123] (b) must not require demolition or alteration of existing housing subject to: (1) a recorded restrictive covenant,[124] (2) a rent restriction,[125] or (3) a house occupied by a tenant for the last three years;[126] and (c) must not be in a historic district.[127] The two new lots must be of "approximately equal lot area,"[128] and each parcel must be a minimum size of 1200 square feet[129] on which up to two units consisting of "at least 800 square feet in floor area" may be constructed.[130] If these criteria are met, the local

/en/SB-9-10-Polling-California-Voters-Strongly-Oppose-2-Housing-Bills [https://perma.cc/AU38-ZNMH].

116. Kenslea, *supra* note 114.

117. Kenslea, *supra* note 114.

118. Kenslea, *supra* note 114.

119. S.B. 9 was signed by California Governor Gavin Newsome on September 16, 2021–two days after he survived a recall election. Savidge, *supra* note 112.

120. CAL. GOV'T CODE §§ 65852.21, 66411.7, 66452.6 (2022).

121. CAL. GOV'T CODE § 65852.21(a).

122. CAL. GOV'T CODE § 66411.7(a).

123. CAL. GOV'T CODE §§ 65852.21(a)(1), 66411.7(a).

124. CAL. GOV'T CODE §§ 65852.21(a)(3), 66411.7(a)(3)(D).

125. CAL. GOV'T CODE §§ 65852.21(a)(3)(A), 66411.7(a)(3)(D)(ii).

126. CAL. GOV'T CODE §§ 65852.21(a)(3)(C), 66411.7(a)(3)(D)(iv).

127. CAL. GOV'T CODE §§ 65852.21(a)(6), 66411.7(a)(3)(E).

128. CAL. GOV'T CODE § 66411.7(a)(1).

129. *Id.* at § 66411.7(a)(2).

130. CAL. GOV'T CODE § 65852.21(b)(2)(A).

government "shall ministerially approve" the development or the lot split.[131]

Local government authority is limited to requiring certain "conditions" on the development.[132] The proposed development or lot split may be denied by the local government upon written findings, supported by a preponderance of the evidence that it causes a "specific, adverse impact . . . upon public health and safety" that cannot be mitigated.[133] No homeowner occupancy requirement may be imposed.[134] According to the Terner Center for Housing Innovation at University of California, Berkeley, S.B. 9 creates a "baseline" for multi-family housing on parcels zoned for single-family dwellings.[135] Not surprisingly, local governments exercising their right to adopt ordinances to implement S.B. 9 (usually) restrict its application.[136] Now, volunteers in the "duplex police" visit areas to assess a local government's compliance with S.B. 9.[137]

B. Atlanta's Ordinance and the Public Reaction to City Initiated Rezoning of Single-Family Zoned Neighborhoods

In June 2019, Atlanta issued the One Atlanta Housing Affordability Action Plan (HAAP).[138] HAAP contained Mayor Keisha Lance Bottoms's plan for "20,000 affordable homes by 2026"[139] and $1 billion in new investment from "public, private, and philanthropic sources."[140] HAAP also proposed revisions to Atlanta's zoning ordinance,[141] including implementation of a "Missing Middle Housing" ordinance.[142] To remedy the "Missing Middle," Atlanta proposed "incentives for property owners and developers to fill the gap between single-family housing and mid-rise construction by changing the zoning code to allow property owners in targeted areas of the city to build or renovate duplexes, triplexes, townhomes, and garden-style apartments, among other building

131. CAL. GOV'T CODE § 66411.7(a).

132. *Id.* at § 66411.7(e).

133. CAL. GOV'T CODE §§ 65852.21(d), 66411.7(d).

134. CAL. GOV'T CODE § 66411.7(g)(3).

135. Savidge, *supra* note 112.

136. Manuela Tobias, *With More Enforcement Power Than Ever, State Relies On Activists To Enforce Duplex Law,* CAL MATTERS (Apr. 24, 2022), https://calmatters.org/housing/2022/04/california-duplex-housing/ [https://perma.cc/NZV7-XPQ7].

137. Tobias, *supra* note 135.

138. ONE ATLANTA, s*upra* note 105.

139. ONE ATLANTA, *supra* note 105 at 3.

140. ONE ATLANTA, *supra* note 105 at 3.

141. ONE ATLANTA, *supra* note 105 at 5.

142. ONE ATLANTA, *supra* note 105 at 15.

types."[143] HAAP asserted that expanded options for building multi-unit structures in designated single-family neighborhoods located near mass transit would: improve affordability; increase the overall supply of housing; and make less-expensive housing options available within resource-rich neighborhoods.[144] Last, HAAP proposed allowing Accessory Dwelling Units (ADU) as second dwellings on single-family zoned lots.[145]

To implement HAAP's recommendations, Councilmember Amir R. Farokhi introduced three ordinances:[146] (a) Ordinance 21-O-0454 to rezone approximately 2000 parcels located within one-half mile of a transit station from a single-family zoning classification to a new zoning district: Multifamily Residential Multi Unit (MR-MU);[147] (b) Ordinance 21-O-0455 to amend Atlanta's Comprehensive Plan to change the Land Use Element applicable to the parcels in Ordinance 21-O-0454 to be consistent with MR-MU zoning;[148] and (c) Ordinance 21-O-0456 to change the text of Atlanta's Zoning Ordinance to allow development consistent with HAAP's recommendations by Special Administrative Permit.[149] On July 6, 2021, the Community Development/Human Services Committee referred all three ordinances to the Zoning Review Board (ZRB) and subsequently Atlanta's Neighborhood Planning Units (NPU).

At the end of the day, a substitute for Ordinance 21-O-0456 was proposed but not enacted.[150] In its Preamble, Ordinance 21-O-0456 states that "Atlanta is missing its middle housing densities."[151] The Preamble cites data that 110,000 structures in Atlanta had only one unit, 76,000 structures had over 50 units, "but [there are] only about 15,000 structures with between 2–4 units."[152] It continues that 11,500 new residential units would be created if 15% of single-family zoned

143. ONE ATLANTA, *supra* note 105 at 15.

144. ONE ATLANTA, *supra* note 105 at 17.

145. ONE ATLANTA, *supra* note 105 at 16.

146. Dyana Bagby, *Atlanta Councilmember Proposes Zoning To Make City 'More Accessible And Inclusive,'* ATLANTA BUSINESS CHRONICLE (July 13, 2021), https://www.bizjournals.com/atlanta/news/2021/07/13/atlanta-regulations-housing-affordability.html [https://perma.cc/ZF9S-HRAZ].

147. Atlanta, Ga., Proposed Ordinance 21-O-0454 (Aug. 31, 2021). *See Atlanta City Design Housing: Proposed Policies*, Dep't of City Planning, https://www.atlcitydesign.com/acdhousing (last visited Nov. 23, 2022) [https://perma.cc/VD5S-HW74].

148. Atlanta, Ga., Proposed Ordinance 21-O-0455 (Aug. 31, 2021). *See* ATLANTA CITY DESIGN, *supra* note 146.

149. Atlanta, Ga., Proposed Ordinance 21-O-0456 (Aug. 31, 2021). *See* ATLANTA CITY DESIGN, *supra* note 146.

150. *See* ATLANTA CITY DESIGN, *supra* note 146.

151. Atlanta, Ga., Ordinance 21-O-0456 Preamble.

152. *Id.*

properties added an ADU.[153] Affordability of the new residential units after construction was presumed.[154]

Ordinance 21-O-0456 creates nine distinct MR districts to which the parcels identified in Ordinance 21-O-0454 would be zoned to "target[] 'Missing Middle' housing needs."[155] In each MR district, four dwelling units per lot are allowed,[156] with increased density bonuses for affordable housing.[157] MR-MU allows structures up to three stories high, right in the middle of single-family dwellings.[158]

Ordinance 21-O-0456 particularly impacts Atlanta's R-4, R-4A and R-4B single-family districts (the R-4 districts), which include significant portions of Midtown and Ansley Park. Even on parcels not proposed to be rezoned to one of the nine MR classifications, Ordinance 21-O-0456 redefines a "Dwelling, Accessory" to permit a secondary dwelling on the same lot as a primary dwelling.[159] In the R-4 districts, it allows a lot for an ADU to be subdivided by a zero lot line division by Special Administrative Permit.[160] Ordinance 21-O-0456 effectively turns these three single-family zoning districts into duplex districts by administrative action, without regard to the notice and hearing requirements provided in ZPL.

Plainly, the attempt to simultaneously implement the text of Ordinance 21-O-0456 and rezone nearly 2,000 single-family zoned parcels touched a nerve with property owners whose objections were voiced before the NPUs. NPU-B (Buckhead/Lenox) opposed Ordinance 21-O-0456 by a vote of 21-1.[161] On October 5, 2021, NPU-E (Midtown/Ansley Park) also voted to oppose the Ordinance.[162] It submitted a strongly-worded letter opposing Ordinance 21-O-0456 to

153. *Id.*

154. *Fact Sheet: Ordinance 21-O-0456*, Atlanta Dep't of City Planning (Sept. 2021), https://www.grantpark.org/Files/gpna/2021/Z-21-73FactSheet_amended.pdf [https://perma.cc/L9R5-373S].

155. Atlanta, Ga., Ordinance 21-O-0456 § 1A (amending Zoning Ordinance Section 16-35.003).

156. *Id.* § 1C (amending Zoning Ordinance Section 16-35.010(1)).

157. *Id.* § 1E (amending Zoning Ordinance Section 16-35.010).

158. *Id.* § 1A (amending Zoning Ordinance Section 16-35.003).

159. *Id.*

160. *Id.* § 3E (amending Zoning Ordinance, Section 16-06.007 (R-4 Zone)).

161. Savannah Sicurella, *'Density Does Not Equal Affordability:' Buckhead Neighborhoods Reject Residential Zoning Changes,* ATLANTA BUSINESS CHRONICLE (June 10, 2021), https://www.bizjournals.com/atlanta/news/2021/10/06/buckhead-says-no.html [https://perma.cc/9CQZ-HE59].

162. *NPU-E Voting Report* (Oct. 5, 2021), https://www.npueatlanta.org/actions-2021 [https://perma.cc/3E7K-UMA3].

Atlanta's Department of Planning.[163] Then, NPU-E contacted each NPU to request they also oppose adoption of the ordinance.[164] By a wide margin, the NPUs recommended rejection of Ordinance 21-O-0456. However, the NPUs' objections were discounted as uninformed by the ZRB.

Irrespective of NPU opposition, Ordinance 21-O-0456 was revised, and Ordinance Z-21-74 was presented as a substitute before ZRB.[165] Z-21-74 would create the nine MR-MU districts, allowing up to four dwelling units per lot, when utilizing affordable housing density bonuses.[166] But, the rezoning of 2,000 properties to MR-MU identified in Ordinance 21-O-0454 did not occur. In the R-4 districts, a single zero lot line division is allowed for a detached dwelling up to twenty-four feet in height and consisting of 1,000 square feet or less.[167] On December 26, 2021, the Atlanta City Council voted "to file Z-21-74, meaning it will not be included in the 2022 legislative session."[168]

C. The Georgia Legislature Responds

The General Assembly responded to Atlanta's zoning and housing initiatives with targeted legislation included in H.B. 1405's amendments to ZPL, discussed above.[169] The legislature strongly supported continuation of single-family zoning districts. H.B. 1405 imposes significant procedural hurdles and extends time deadlines to prevent local zoning actions similar to those considered by Atlanta.[170]

The preamble to H.B. 1405 states that the legislature's intent is "to provide additional notice and hearing provisions for changes to zoning ordinances [] revis[ing] single-family residential classifications and

163. *See Z-21-74: Zoning: ADU, MRMU, Parking* (Oct. 7, 2021), https://www.npueatlanta.org/actions-2021 [https://perma.cc/J39X-FAGW].

164. *NPU-E Call to Action: NPU-E Opposition to Z-21-74* (Oct. 8, 2021), https://www.npueatlanta.org/actions-2021 [https://perma.cc/2J2H-CB5U].

165. Atlanta, Ga., Ordinance 21-O-0456 (Z-21-74); *see* ATLANTA CITY DESIGN, *supra* note 146.

166. Atlanta, Ga., Ordinance 21-O-0456 (Z-21-74) § 1; *see also* City of Atlanta, *Z-21-74 Fact Sheet*, Dep't of City Planning, Office of Zoning and Development (July 2021), https://ansleypark.org/resources/Pictures/Zoning/Z-21-74%20Fact%20Sheet.pdf (last visited Sept. 3, 2022) [https://perma.cc/8MTH-NEA9]; *See* Atlanta, Ga., Ordinance 21-O-0456 (Z-21-74).

167. Atlanta, Ga., Ordinance 21-O-0456 (Z-21-74) § 3.

168. *Atlanta City Design Housing*, Dep't of City Planning, http://www.atlcitydesign.com/acdhousing (last visited Nov. 25, 2022) [https://perma.cc/7DQT-WDPT].

169. Ga. H.R. Bill 1405, 2022 Ga. Laws 825.

170. *Id.*

definitions so as to authorize multifamily residential property uses."[171] To that end, H.B. 1405, which is codified at O.C.G.A. § 36-66-4(h)(1), provides that:

> Notwithstanding any other provisions of this chapter to the contrary, when a proposed zoning decision relates to an amendment of the zoning ordinance to revise one or more zoning classifications or definitions relating to single-family residential uses of property so as to authorize multifamily uses of property pursuant to such classification or definitions, or to grant blanket permission, under certain or all circumstances, for property owners to deviate from the existing zoning requirements of a single-family residential zoning, such zoning decision must be adopted in the following manner.[172]

Before adoption, two regular meetings of the local government must be conducted at least twenty-one days apart.[173] Then, the zoning ordinance amendment must be put on hold for at least three, but not more than nine, months before the local government can take final action, which requires two more hearings.[174]

Notice of such hearings must be posted on each affected premise.[175] If more than 500 parcels are affected, notice is required every 500 feet in the "affected area."[176] Newspaper publication is also required.[177] Both the posted notice and the published notice of the zoning ordinance amendment "shall include a prominent statement that the proposed zoning decision relates to or will authorize multifamily uses or give blanket permission to the property owner to deviate from the zoning requirements of a single-family residential zoning of property in classification previously relating to single-family residential uses."[178] The published notice must be at least "nine column inches in size," and it cannot be located in the classified advertising section.[179] H.B. 1405 further imposes the same requirements on any zoning decision which seeks to abolish single-family residential zoning classifications.[180]

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171. *Id.* at Preamble.
172. O.C.G.A. § 36-66-4(h)(1).
173. O.C.G.A. § 36-66-4(h)(1)(A).
174. O.C.G.A. § 36-66-4(h)(1)(B).
175. O.C.G.A. § 36-66-4(h)(1)(B)(i).
176. *Id.*
177. O.C.G.A. § 36-66-4(h)(1)(B)(ii).
178. O.C.G.A. § 36-66-4(h)(1).
179. *Id.*
180. O.C.G.A. § 36-66-4(h)(2).

While H.B. 1405 does not prohibit local governments from making the zoning changes proposed by Atlanta,[181] it implements effective roadblocks to prevent such enactments while allowing time for neighborhood political opposition to develop. The requirement of multiple hearings over a protracted time is a proven and effective deterrent to zoning decisions involving unpopular land uses, such as drug and substance treatment facilities.[182] With H.B. 1405, the Georgia legislature clearly sent a signal to local governments to retain single-family zoning districts as a matter of state policy.

D. Will the Elimination of Single-Family Zoning Districts Achieve the Intended Goal of Making Housing Affordable?

It is too early to tell whether Atlanta's Ordinance 21-O-0456 and the duplex-style development it sought to impose in single-family zoning districts will result in more affordable housing. However, it is highly unlikely. It is naïve to believe that a sudden surge of duplex construction on single-family lots will do much to make housing more affordable.

It is valid to ask whether Ordinance 21-O-0456 was intended as a basic statement of housing fairness, because reading the texts of Ordinance 21-O-0456 and its California counterpart, one senses an underlying jealousy and resentment toward single-family zoning districts with houses on larger lots—though Ordinance 21-O-0456 did not attempt to redevelop Buckhead with duplexes. It does not even apply to Atlanta's most exclusive residential communities, which appear to be predominantly zoned R-1, R-2, and R-3. Of course, application of Ordinance 21-O-0456 to single-family properties in the prime sections of Buckhead would only reignite the now smoldering Buckhead secession movement.[183]

Ordinance 21-O-0456, like its California counterpart, erroneously presumed that greater density and smaller lots will result in construction of affordable housing. While a larger residential lot in a single-family zoning district likely costs more than a smaller one, the division of that lot into a smaller one does not guarantee that a house constructed on the new (or second) lot will be affordable. Residential areas of San Francisco

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181. The City of Decatur proposed a similar, but apparently less comprehensive, ordinance to promote affordable housing, as well. *See* Zoe Seiler, *Decatur City Commission Adds Housing Flexibility To Unified Development Ordinance*, DECATURISH (Oct. 20, 2021), https://decaturish.com/2021/10/decatur-city-commission-adds-housing-flexibility-to-unified-development-ordinance/ [https://perma.cc/6ZQB-EMZL].

182. *See* O.C.G.A. § 36-66-4(f).

183. Howard Huscock, *Secession in Atlanta?* CITY JOURNAL (May 19, 2022), https://www.city-journal.org/georgia-republicans-to-vote-on-buckhead-secession [https://perma.cc/5YC5-K2UM].

and New York are very densely developed on small lots, and housing there costs more than virtually any other location in the country.[184]

Ordinance 21-O-0456 presumed that the developer of an ADU on an existing single-family residential lot will construct a smaller, affordable dwelling, even if the now-divided lot is located in an affluent area. This presumption is wrong. Lot division envisioned by Ordinance 21-O-0456 in an affluent area of expensive homes will simply result in another expensive dwelling being built on a second lot adjoining the first. Incentives encouraging development of affordable housing in an affluent area will not produce a return on the developer's investment comparable to the return when a high-end expensive dwelling is constructed. By definition, development incentives are not requirements to construct affordable housing. Incentives are just that, giving the developer an option to think about. Any developer will select the option that provides the greater rate of return on investment.

The division of a lot envisioned by Ordinance 21-O-0456 in a low-income area with substandard dwellings will simply result in another low-income, poorly constructed, cheaper dwelling being built on a second lot that adjoins the first. Both dwellings will likely be rented, and the new dwelling will in short order deteriorate to a condition comparable to the first. Under Ordinance 21-O-0456, the affluent area will continue to be affluent, and the low-income area will continue to be just as it was before the lot split.

Atlanta's Ordinance 21-O-0456 does not encourage home ownership. Atlanta already ranks below average in economic mobility.[185] Policies to encourage home ownership should be prominent in any city's housing policy. It is the most effective way by which modest-income families can grow equity and achieve housing security over the long-term.[186] Zoning that allows more rental duplex units does not help accomplish that goal in any manner.

Further, Ordinance 21-O-0456 is silent on Atlanta's problem of homelessness. Atlanta's homelessness problem is obvious as there are

184. AEI Housing Center, *Best & Worst Metros to Be a First-time Homebuyer in 2019*, https://www.aei.org/wp-content/uploads/2020/11/FTB-Infographic-2019-FINAL.pdf?x91208 (last visited Sept. 3, 2022) [https://perma.cc/YPP6-6QZ3].

185. Patrick Sharkey & Bryan Graham, *Mobility and the Metropolis: How Communities Factor Into Economic Mobility*, PEW TRUSTS (Dec. 2013), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/mobilityandthemetropolispdf.pdf, at 4, 6 [https://perma.cc/X8SA-P6P4].

186. Jennifer Molinsky, *Homeownership and Affordable Housing a Key Part of Upward Mobility, but Hard to Come By*, HARV. JOINT CTR. FOR HOUS. STUDIES (June 10, 2015), https://www.jchs.harvard.edu/blog/homeownership-and-affordable-housing-a-key-part-of-upward-mobility-but-hard-to-come-by [https://perma.cc/FZY8-D3SN].

tent cities located on the block bounded by Atlanta City Hall, the Fulton County Courthouse, and the State Capitol. In the legislature, House Bill 713,[187] the Reducing Street Homelessness Act, proposed to cut funding to cities that did not enforce laws against street camping and sleeping on public streets.[188] Dividing lots and constructing duplexes in single-family districts will not help resolve Atlanta's homelessness problem.

Finally, Ordinance 21-O-0456, by allowing duplex development as a matter of right in single-family zoning districts, imposes significant land use changes. These changes will impact property values in one direction or the other. However, single-family zoning has existed for decades, and property owners relied on the provisions and protections afforded by the R-4, and comparable single-family, zoning districts in making decisions about where to live. If Ordinance 21-O-0456, and its permitted duplexes, causes the diminution in value of single-family dwellings, the amount of diminution constitutes a taking of the property owner's value. The cost to other Atlanta taxpayers to compensate property owners for the diminution in value of the properties affected by Ordinance 21-O-0456 will be enormous and further compound the problem.

187. Ga. H.R. Bill 713, Reg. Sess. (2021) (died in committee).

188. *Id.*