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Zoning and Land Use Law

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I. INTRODUCTION

Each annual survey of Georgia zoning and land use law since 2017 has chronicled judicial decisions ostensibly intended to transform legislative zoning decisions into quasi-judicial actions.[1] These include *City of Cumming v. Flowers*, in which the Supreme Courtof Georgia held a local government variance decision, and any other zoning or entitlement decision tightly controlled by the local ordinance, is quasi-judicial and may only be appealed by writ of certiorari, regardless of the mechanism for appeal set out in the local government's ordinance;[2] *York v. Athens College of Ministry, Inc.*, in which the Court of Appeals of Georgia held that consideration of a special/conditional use permit is a quasi-judicial decision;[3] and *Diversified Holdings, LLP v. City of Suwanee*, in which the Supreme Court of Georgia reiterated that an application for discretionary

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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 & Joshua Williams, *Zoning and Land Use Law*, *Annual Survey of Georgia Law*, 74 MERCER L. REV. 313 (2022), https://digitalcommons.law.mercer.edu/jour_mlr/vol74/iss1/21/ [https://perma.cc/CX6K-B35A].

2. 300 Ga. 820, 820, 797 S.E.2d 846, 848 (2017). A writ of certiorari is required to appeal the denial of a variance to the superior court because a variance is a quasi-judicial decision. *See also* O.C.G.A. § 5-4-1(a) (1986) (repealed July 1, 2023).

3. 348 Ga. App. 58, 64, 821 S.E.2d 120, 125 (2018).

appeal is required to appeal from a trial court decision on an adverse rezoning decision, which is "an adjudicative decision made by a local government body acting in an administrative role."[4]

It seemed inevitable that Georgia's appellate courts would transform legislative rezoning decisions into quasi-judicial proceedings, affecting both the manner in which an appeal must be taken to superior court challenging the local government's zoning action and the procedure for appeal from superior court to the Supreme Court of Georgia and the Court of Appeals of Georgia. However, 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."[5]

Last year's Survey Article reported on two legislative enactments in 2022: House Bill (HB) 1405,[6] which significantly revised Georgia's Zoning Procedures Law (ZPL), O.C.G.A. § 36-66-1–7,[7] and the Superior and State Court Appellate Practice Act (SSAPA), now codified at O.C.G.A. §§ 5-3-1–31,[8] which replaced the arcane and antiquated writ of certiorari appeal procedure.[9] By simplifying appeal procedures to superior court and redefining certain terms, HB 1405 and SSAPA undermined the necessity that Georgia's appellate courts resolve the issue of whether a rezoning decision is legislative or quasi-judicial.

However, several cases predating enactment of HB 1405 and SSAPA were still pending and decided by the court of appeals during the survey period. This Article reviews opinions of the court of appeals in three such cases: *Schroeder Holdings, LLC v. Gwinnett County*;[10] *Pickens County v. Talking Rock Bluffs, LLC*;[11] and *Hall County v. Cook Communities*.[12] Each opinion appears to halt the judicial transformation of legislative

4. 302 Ga. 597, 597, 807 S.E.2d 876, 879 (2017).

5. *See* Galloway & Williams, *supra* note 1, at 313.

6. Ga. H.R. Bill 1405, Reg. Sess., 2022 Ga. Laws 825 (codified at O.C.G.A. §§ 36-66-1–7).

7. O.C.G.A. §§ 36-66-1–7.

8. O.C.G.A. §§ 5-3-1–31 (enacted by Ga. H.R. Bill 916, Reg. Sess., 2022 Ga. Laws 767).

9. Ga. H.R. Bill 916, Reg. Sess. (2022). Also, during the survey period, in a concurrence to a denial of a petition for certiorari of the Supreme Court of Georgia, Justice Peterson noted that the interpretation of the substantial evidence standard under the predecessor statutory scheme to the SSAPA (and other statutes employing the same) as meaning "any evidence" may be misguided. Florida Rock Indus. v. Clayton Cnty. Bd. of Comm'rs, 316 Ga. 380, 382, 888 S.E.2d 573, 574 (2023). The SSAPA, to avoid the conflation of the applicable evidentiary standard, states that factual determinations are reviewed to determine if they are supported by "sufficient evidence." O.C.G.A. § 5-3-5(a)(4) (2022).

10. 366 Ga. App. 353, 883 S.E.2d 37 (2023) (petition for certiorari denied on August 21, 2023).

11. 367 Ga. App. 46, 885 S.E.2d 24 (2023).

12. 368 Ga. App. 536, 890 S.E.2d 462 (2023).

zoning decisions into quasi-judicial proceedings. Together, they comprise a judicial trifecta which: (a) holds that a legislative rezoning decision is directly appealable to superior court to be heard *de novo*; and (b) continues to hold that an appeal of a legislative rezoning decision from superior court must be by application for discretionary appeal, citing *Trend Development Corp. v. Douglas County.*[13]

A writ of certiorari to the Georgia Supreme Court filed in *Schroeder* was denied on August 21, 2023, likely halting further litigation in which the transformation of legislative zooning decisions into quasi-judicial proceedings will be considered—at least for now.

This year's Survey Article also reviews new rules issued by the Georgia Department of Community Affairs (DCA) governing annexation disputes. Since most annexation disputes arise from objections to land use and zoning changes actions applied to property upon annexation, the new arbitration procedures set out therein to resolve land use disputes are significant. This Survey Article also reviews other recent judicial decisions issued during the survey period on zoning-related issues and a decision interpreting the newly-enacted Article I, Section II, Paragraph V(b) of the Georgia Constitution of 1983,[14] which was discussed in the installment of this Survey Article appearing in the 73rd Volume of the *Mercer Law Review*'s Annual Survey of Georgia Law.[15]

II. GEORGIA COURT OF APPEALS CASES REGARDING LEGISLATIVE DECISIONS

A. Schroeder Holdings, LLC v. Gwinnett County

In *Schroeder Holdings, LLC v. Gwinnett County*, the Schroeder Holdings, LLC (Schroeder) filed an application to rezone a 100-acre tract of land with Gwinnett County (the county).[16] "Schroeder asserted that the property had no 'reasonable economic use as currently zoned' because 'the cost to improve this type of property would not yield enough return with the larger tracts' required under the existing zoning classification."[17] Ultimately, the Gwinnett County Board of Commissioners (the BOC) denied Schroeder's rezoning application.[18]

13. 259 Ga. 425, 383 S.E.2d 123 (1989).

14. GA. CONST. art. I, § 2, para. 5(b).

15. Newton M. Galloway & Steven L. Jones, *Zoning and Land Use Law*, 73 MERCER L. REV. 329 (2021), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss1/21/ [https://perma.cc/FD7C-TRNS].

16. 366 Ga. App. 353, 353 883 S.E.2d 37, 38 (2023), *cert. denied* (Aug. 21, 2023).

17. *Id.* at 353, 883 S.E.2d at 38–39.

18. *Id.* at 353, 883 S.E.2d at 39.

Schroeder and others (the appellants) filed a complaint and petition for certiorari in superior court, seeking a reversal of the BOC's denial and claiming that such denial amounts to a "regulatory taking, inverse condemnation, and substantive due process violations, in addition to seeking a review of the zoning decision pursuant to a writ of certiorari."[19]

The county filed a motion to dismiss asserting that the BOC's decision was quasi-judicial, and the appellants failed to comply with the procedural requirements necessary for quasi-judicial actions and the appellants' claims were barred because of sovereign immunity.[20] In response, the appellants sought to add the BOC as a party. Later, the county filed a motion for summary judgment asserting the same arguments and that the appellants' "claims for inverse condemnation and regulatory taking are not allowed as a matter of law in zoning cases such as this one."[21] The superior court granted the county's motion for summary judgment, finding that the appellants

> [C]ould only obtain relief [from the BOC's zoning decision] by seeking certiorari review of the Board's decision, and that they had failed to comply with the statutory requirements for seeking that relief, including failing to name the Board as the respondent. The court also found that [the] Appellants' claims were barred by the doctrine of sovereign immunity.[22]

On appeal, the Court of Appeals of Georgia agreed with Schroeder that the trial court "erred in concluding that the [BOC's] denial was a quasi-judicial . . . decision that could only be challenged by way of certiorari."[23] The court clarified that the Georgia Supreme Court's decision in *Diversified Holdings, LLP v. City of Suwanee* did not affect how local government zoning and entitlement decisions are appealed.[24] The court explained that "[i]n *Diversified* . . . the Supreme Court of Georgia concluded that, for purposes of determining whether a discretionary application under O.C.G.A. § 5-6-35(a)(1) must be filed instead of a notice of appeal under O.C.G.A. § 5-6-34(a)(1), rulings on rezoning applications are adjudicative in nature."[25] Ultimately, after a thorough recitation of precedent on the distinction between legislative and quasi-judicial zoning and entitlement decisions, the court held that

19. *Id.* at 354, 883 S.E.2d at 39.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 356, 883 S.E.2d at 41.
24. *Id.* (citing *Diversified*, 302 Ga. at 600–05, 807 S.E.2d at 881–84).
25. *Id.* at 356, 883 S.E.2d at 40.

"*Diversified* is not precedent for the issue of whether the denial of a rezoning application may only be challenged by way of a writ of certiorari."[26]

In a footnote, the court noted that the amendment ZPL defining which entitlement decisions are legislative and which are quasi-judicial would have clarified this issue, but that amendment only applies to decisions made on or after July 1, 2022, and, therefore, the ZPL amendment did not apply to the 2019 rezoning decision at issue in *Schroeder*.[27] In another footnote, the court noted that Justice Warren, in her concurrence in *IDI Logistics v. City of Douglasville*,[28] had "questioned whether 'a party challenging the denial of a rezoning application must, in all instances'" appeal by certiorari.[29]

Next, the court examined whether sovereign immunity barred the appellants' claims against the county.[30] First, the court noted that "[t]he Supreme Court of Georgia has long held that the Just Compensation Provision [of the Georgia Constitution of 1983] 'waives sovereign immunity for inverse condemnation claims seeking monetary compensation."[31] Additionally, that constitutional provision waives sovereign immunity for injunctive relief claims where "the Just Compensation Provision's requirement[s] of prepayment before a taking or damaging applies and has not yet been met" or "the authority effecting a taking or damaging has not invoked the power of eminent domain."[32] Therefore, the appellants' taking claim and request for damages and equitable relief were not barred by sovereign immunity.[33]

However, the court determined that sovereign immunity did bar the appellants' substantive due process claim under *Lathrop v. Deal*,[34] which held that sovereign immunity bars "suits for injunctive and declaratory relief from the enforcement of allegedly unconstitutional laws."[35] In other words, the appellants should have followed the guidance of *Lathrop* and asserted these claims against the members of the BOC in their individual capacities. The court also noted that the recent amendment to Article I,

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26. *Id.*

27. *Id.* at 356 n.1, 883 S.E.2d at 40 n.1.

28. 312 Ga. 288, 862 S.E.2d 324 (2021).

29. *Schroeder*, 366 Ga. App. at 356 n.2, 883 S.E.2d at 40 n.2 (discussing *IDI Logistics*, 312 Ga. at 288–89, 862 S.E.2d at 325 (Warren, J., concurring)).

30. *Id.* at 357, 883 S.E.2d at 41.

31. *Id.* (quoting Dep't of Transp. v. Mixon, 312 Ga. 548, 548, 864 S.E.2d 67, 69 (2021)).

32. *Id.* at 358, 883 S.E.2d at 41 (quoting *Mixon*, 312 Ga. at 548, 864 S.E.2d at 69).

33. *Id.*

34. 301 Ga. 408, 801 S.E.2d 867 (2017).

35. *Shroeder*, 366 Ga. App. at 358–59, 883 S.E.2d at 42 (quoting *Lathrop*, 301 Ga. at 444, 801 S.E.2d at 892).

Section II, Paragraph V(b)(1) of the Georgia Constitution of 1983 would have permitted the claims to proceed against the county, but that constitutional provision "applies only to 'acts which occur on or after January 1, 2021.'"[36]

B. Pickens County v. Talking Rock Bluffs, LLC

In *Pickens County v. Talking Rock Bluffs, LLC*, after having its rezoning application denied, Talking Rock Bluffs, LLC (Talking Rock) appealed the denial by both certiorari and a direct appeal seeking declaratory and injunctive relief.[37] Pickens County (the county) sought to dismiss the declaratory judgment action asserting that the rezoning denial should have been only appealed by certiorari. The trial court denied the county's motion to dismiss but directed Talking Rock to elect upon which action it desired to pursue, pursuant to prohibition on simultaneous prosecutions under O.C.G.A. § 9-2-5(a).[38] On appeal, the court of appeals noted the confusion created by *Diversified Holdings*.[39]

Like the court in *Schroeder*, the court in *Pickens County* noted that *Diversified Holdings* had no bearing on the characterization of local government zoning decisions for the purpose of determining whether such decisions must be appealed to superior court by an on-the-record certiorari proceeding or a direct appeal.[40] In other words "since *Diversified* did not actually address and resolve the issue of the proper method of challenging a local authority's rezoning decision in the superior court, that case should not be read as precedent on that issue and we should, instead, rely on 'existing law.'"[41] Accordingly, the court held that the trial court did not err in not granting the county's motion to dismiss and the trial court was correct in requiring Talking Rock to elect among its remedies.[42]

C. Hall County v. Cook Communities

In *Hall County v. Cook Communities*, Cook Communities (Cook) sought to rezone property in Hall County (the county).[43] The County Board of Commissioners (BOC) approved the rezoning but with conditions Cook found untenable. Cook appealed, suing the county and

36. *Id.* at 357 n.3, 883 S.E.2d at 41 n.3, (quoting GA. CONST. art. I, § 2, para. 5(b)(1)).
37. 367 Ga. App. 46, 47, 885 S.E.2d 24, 24–25 (2023).
38. *Id.* at 47, 885 S.E.2d at 25 (discussing O.C.G.A. § 9-2-5(a) (1982)).
39. *Id.* at 48, 885 S.E.2d at 26.
40. *Id.* at 49, 885 S.E.2d at 26.
41. *Id.* (quoting *Schroeder*, 336 Ga. App. at 356, 883 S.E.2d at 40–41).
42. *Id.* at 49–50, 885 S.E.2d at 26.
43. 368 Ga. App. 536, 890 S.E.2d 462 (2023).

the members of the BOC in their individual capacities seeking declaratory, injunctive, and mandamus relief. As could be expected, the county moved to dismiss Cook's suit arguing that the rezoning decision was quasi-judicial and Cook should have appealed via certiorari.[44] After summarizing *Schroeder*, *Pickens County*, and *Diversified*, the Georgia Court of Appeals held that the trial court did not err in denying the County's motion to dismiss because Cook "was not limited to review of the zoning authority's decision by writ of certiorari."[45]

With these three decisions, it seemed clear that the court of appeals took a stand to ensure the Rubicon would not be crossed.[46] However, Judge Gobeil dissented in *Hall County*, hinting that there may still be a chance.[47] In her dissent, Judge Gobeil "encourage[d] the Supreme Court of Georgia to consider granting certiorari in *Schroeder Holdings, LLC*."[48] The dissent noted that there are three essential characteristics of a quasi-judicial act:

> First, a quasi-judicial act is one as to which all parties are as a matter of right entitled to notice and to a hearing, with the opportunity afforded to present evidence under judicial forms of procedure. Second, a quasi-judicial act is one that requires a decisional process that is judicial in nature, involving an ascertainment of the relevant facts from evidence presented and an application of preexisting legal standards to those facts. Third, a quasi-judicial decision reviewable by writ of certiorari is one that is final, binding, and conclusive of the rights of the interested parties.[49]

Judge Gobeil noted that legislative decisions are "prospective in application, general in application, and often marked by a general factual inquiry that is not specific to the unique character, activities or circumstances of any particular person."[50] As this Survey Article and Judge Gobeil have noted, a rezoning decision "does not neatly fit into

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44. *Id.* at 537, 890 S.E.2d at 463–64.

45. *Id.* at 540, 890 S.E.2d at 466 (quoting *Talking Rock*, 367 Ga. App. at 50, 885 S.E.2d at 26).

46. *Id.* at 540,890 S.E.2d at 466–67; *See Schroeder Holdings, LLC*, 366 Ga. App. 353, 883 S.E.2d 37; *see Talking Rock Bluffs, LLC*, 367 Ga. App. 46, 885 S.E.2d 24; *see Cook Communities*, 368 Ga. App. 536, 890 S.E.2d 462.

47. *Cook Communities*, 368 Ga. App. 540, 541, 890 S.E.2d, 462, 466 (Gobeil, J., dissenting).

48. *Id.* (Gobeil, J., dissenting).

49. *Id.* at 541, 890 S.E.2d at 466–67 (Gobeil, J., dissenting) (quoting Housing Auth. of the City of Augusta v. Gould, 305 Ga. 545, 551, 826 S.E.2d 107, 111–12 (2019)).

50. *Id.* at 541–42, 890 S.E.2d at 467 (Gobeil, J., dissenting) (quoting City of Cumming v. Flowers, 300 Ga. 820, 825, 797 S.E.2d 846, 851 (2017)).

either the quasi-judicial or legislative box."[51] On the one hand, (although not noted in the dissent), rezoning decisions are declared by the new and former ZPL to be legislative.[52] Additionally, Georgia precedent has found rezonings to be legislative.[53] Yet, a rezoning decision is also made after notice and a right to a hearing,[54] in a particularized decision process "involving the ascertainment of the relevant facts from evidence presented and an application of preexisting legal standards to those facts," and is final and binding.[55]

In short, as Georgia courts have previously held with conditional/special use permits, in Judge Gobeil's view: some rezonings could be classified as legislative and others could be quasi-judicial.[56] Despite Judge Gobeil's urging, the Georgia Supreme Court's denial of the writ of certiorari in *Schroeder* is likely the last word on the issue. At least for now, the Rubicon will still not be crossed.

III. OTHER RECENT ZONING DECISIONS

A. Mootness: Cobb County v. Mable Oak Development, LLC

In *Cobb County v. Mable Oak Development, LLC*,[57] Cobb County rezoned property for a residential subdivision conditioned upon completion of subdivision amenities by April 29, 2022.[58] The developer, Mable Oak Development, LLC (Mable Oak), completed construction of a significant number of residences in the subdivision, but it could not meet the deadline to construct the amenities. Cobb County withheld certificates of occupancy (COs) on the completed dwellings until the amenities were complete, thereby jeopardizing the sale of the residences.[59] Mable Oak sought an injunction "requiring the county to issue [COs] on all homes that, but for the April 29 deadline, would otherwise qualify for the certificates."[60] The trial court granted the injunction and required the county to issue the COs, directing Mable Oak

51. *Id.* at 542, 890 S.E.2d at 467 (Gobeil, J., dissenting).

52. O.C.G.A. § 36-66-3(4) (2023).

53. *See, e.g.*, *Hall Cnty.*, 368 Ga. App. at 542, 890 S.E.2d at 467; Pickens Cnty. v. Talking Rocks Bluff, LLC., 367 Ga. App. 46, 46–47, 885 S.E.2d 24, 24 (2023); *Flowers*, 300 Ga. at 825, 797 S.E.2d at 851.

54. O.C.G.A. §§ 36-66-4–5.

55. *Hall Cnty.*, 368 Ga. App. at 542–43, 890 S.E.2d at 467 (Gobeil, J., dissenting).

56. *Id.* at 543, 890 S.E.2d at 468 (Gobeil, J., dissenting).

57. 366 Ga. App. 561, 883 S.E.2d 571 (2023).

58. *Id.* at 562, 883 S.E.2d at 573.

59. *Id.*

60. *Id.*

to complete the amenities by June 29, 2022. In response, Cobb County filed a direct appeal, even though it issued the COs required by the trial court.[61]

The Georgia Court of Appeals dismissed Cobb County's appeal as moot.[62] It noted that Cobb County issued the COs, and "houses were sold to purchasers who are not parties to the dispute but who would likely be negatively impacted by a rescission of the [COs] for reasons unrelated to the habitability of their houses."[63] Though the issue on its appeal was moot, Cobb County argued that the case presented an issue of "significant public concern" because the trial court usurped the Cobb County Board of Commissioners' exclusive authority to zone property and enforce its police powers.[64] The court of appeals held that the case did not present an issue of "significant public concern."[65]

B. Standing/Third-Party Assertion of Equal Protection Rights: Franklin County v. Wasserman

In *Franklin County v. Wasserman*,[66] Wasserman contracted to sell property she owned in Franklin County to a buyer of Vietnamese descent who wanted to "build and operate poultry houses" thereon.[67] The purchaser's poultry houses required a conditional use permit (CUP).[68] The purchaser's CUP application was denied, and Wasserman sued the Franklin County Board of Commissioners (the BOC), alleging a violation of equal protection, both as a suspect class and as a "class of one."[69] The trial court denied the BOC's motion for summary judgment, and the BOC appealed.[70]

On appeal, the BOC argued that the trial court erred in denying its summary judgment motion because Wasserman lacked standing to assert an equal protection claim on behalf of her purchaser.[71] Noting that in Georgia "a litigant may assert the rights of a third party in exceptional

61. *Id.* at 562–63, 883 S.E.2d at 573.
62. *Id.* at 563, 883 S.E.2d at 574.
63. *Id.* at 565, 883 S.E.2d at 575.
64. *Id.* at 566, 883 S.E.2d at 576.
65. *Id.*
66. 367 Ga. App. 694, 888 S.E.2d 219 (2023).
67. *Id.* at 695, 888 S.E.2d at 222.
68. *Id.*
69. *Id.*
70. *Id.* at 694, 888 S.E.2d at 221.
71. *Id.* at 696, 888 S.E.2d at 222.

circumstances,"[72] the court required Wasserman to establish that she suffered an "injury in fact" giving her a sufficiently concrete interest in the dispute and that she had a close relation to the third party who experienced some hindrance in the ability to protect its own interests.[73] Wasserman claimed that the BOC denied the CUP, discriminating against her purchaser because he was Vietnamese. She claimed injury because her sales contract fell through, and the property did not sell. The court noted that Wasserman admitted that she had no role in the CUP application, never spoke to her purchaser prior to the zoning hearing, and communicated with him only through her real estate agent. Based thereon, the court held that Wasserman lacked standing to pursue an equal protection claim on behalf of her purchaser.[74]

Further, the court held that Wasserman could not pursue an equal protection "class of one" claim because she could not demonstrate that the BOC treated her differently from others who presented identical facts.[75] Wasserman presented no evidence to the BOC of her disparate treatment, and in fact, the evidence showed that the BOC previously approved two CUP applications for poultry houses filed by persons of Vietnamese descent.[76] Also, the BOC had race-neutral reasons to support denial of the CUP.[77] The court of appeals reversed the trial court and directed it to grant Franklin County's motion for summary judgment.[78]

C. Mandamus Denied for Final Plat Approval; Denial of Vested Development Rights: City of South Fulton v. Strategic Real Estate Partners, LLC; City of South Fulton v. Parkview Estates (GA) Owner I, LLC

These two cases were decided together in an unpublished opinion (the *Joint Opinion*).[79] Each case presented the same legal issue based on different facts. The holding in the *Joint Opinion* is problematic, even if it is not binding or physical precedent.[80]

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72. *Id.* at 696, 883 S.E.2d at 223 (quoting Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 434, 651 S.E.2d 36, 38 (2007)).

73. *Id.* (quoting *Burgess*, 282 Ga. at 434–35, 651 S.E.2d at 38).

74. *Id.* at 697–98, 888 S.E.2d at 223–24 (*see Burgess*, 282 Ga. at 434–35, 651 S.E.2d at 38).

75. *Id.* at 698, 888 S.E.2d at 224.

76. *Id.*

77. *Id.* at 699, 888 S.E.2d at 224.

78. *Id.* at 699, 888 S.E.2d at 225.

79. City of South Fulton v. Strategic Real Estate Partners, LLC, No. A22A1577 (Ga. Ct. App., Feb. 21, 2023); City of South Fulton v. Parkview Estates (GA) Owner I, LLC, No. A22A1578 (Ga. Ct. App., Feb. 21, 2023) (hereinafter, collectively, *Joint Opinion*).

80. Ga. Ct. App. R. 33.2(b).

City of South Fulton v. Strategic Real Estate Partners, LLC,[81] involved plat approval.[82] In Georgia, final plat approval procedures are set out in local ordinances, not the ZPL. Since appropriate zoning for the development is in place, final plat approval is usually a rote exercise. Generally, a plan or plat that complies with the ordinance plat requirements must be approved.[83] Further, a developer's right to improve property and secure permits for development are often tied to the final plat which is recorded with the superior court and serves as the authority for development.[84] However, that may not be the case in the City of South Fulton (the city).

Strategic Real Estate Partners, LLC (Strategic) owned two parcels in the city zoned M-2 (Heavy Industrial).[85] The city issued a Zoning Certification Letter for industrial development to Strategic for both. Strategic combined the two plats and submitted it for final plat approval.[86] The city's ordinance provided that "[t]he final plat shall be considered approved at the time of the certification by the [Department of Community Development and Regulatory Affairs (the department)]."[87] After the final plat was recorded, the ordinance required its "confirmation" by the city council.[88] The city's Director of the Department (the director) recommended approval of Strategic's final plat.[89]

When the plat was presented to the city council, a councilman delayed the confirmation of the final plat and contended that Strategic's proposed industrial development (on property which was already appropriately zoned for industrial development) presented "a problem of epic proportion[s]."[90] The mayor proposed that Strategic's property should be rezoned for office space. The city voted unanimously to deny Strategic's final plat, despite the department's prior approval. Strategic filed a petition for mandamus relief which was granted by the trial court.[91]

In the other case, Parkview Estates (GA) Owner I, LLC (Parkview) owned fifty-eight undeveloped lots intended for single-family homes,

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81. No. A22A1577 (Ga. Ct. App., Feb. 21, 2023).

82. *Joint Opinion*, at 2.

83. *See* 3 Yokley, *Zoning Law and Practice*, § 17-5 (LexisNexis Matthew Bender, 2023).

84. *Id.*

85. *Joint Opinion*, at 2.

86. *Id.*

87. *Id.* (quoting CITY OF SOUTH FULTON, GA., CODE OF ORDINANCES Appendix D § 4.2.2(E) (2018)).

88. *Joint Opinion*, at 2 (*see* CITY OF SOUTH FULTON, GA., CODE OF ORDINANCES Appendix D § 4.2.2(E)).

89. *Joint Opinion*, at 3.

90. *Id.* at 3–5.

91. *Id.* at 6–7.

which it proposed to develop in phases.[92] The final plat for Phase I, consisting of eight lots, was approved by Fulton County, and was recorded in 2007. The final plat for Phase II (consisting of the remaining lots) was approved in 2008. Both plats were approved and recorded prior to the incorporation of the city.[93] The city issued permits for three lots in Phase I. In 2021, Parkview applied for permits on the five remaining lots.[94]

The city "identified an issue with respect to a stream location" that affected one lot, and it failed to issue building permits on the remaining lots in Phase I.[95] The city issued a building permit for one lot in Phase II and denied the others stating that Parkview "must reapply Phase I and Phase II for a final plat before the remaining permits can be issued."[96] It issued a stop-work order on clearing and grading work Parkview had started in 2021 which had been permitted pursuant to an approved soil erosion and sedimentation control plan. Parkview sued, contending that it had a vested right to develop the residential lots and sought a writ of mandamus to compel the director to issue the remaining permits in Phase I and Phase II. Parkview also sought to recover $5.9 million in development costs and expenses. The trial court agreed with Parkview and issued a writ of mandamus directing the city to issue the permits.[97]

The court of appeals reversed in both cases, holding that "the trial court failed to make adequate findings of fact and conclusions of law on whether the mandamus petitions in both cases were premature."[98] Specifically, the court of appeals required the trial court to assess whether Strategic and Parkview "could have pursued alternate remedies" before seeking mandamus relief.[99] The court vacated the judgments granting mandamus in both cases and remanded with direction for the trial court to "prepare, or cause to be prepared, appropriate findings of fact and conclusions of law, and enter a new judgment thereon, after which the losing party shall be free to enter another appeal if [it] should wish to do so."[100]

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92. *Joint Opinion*, at 8 (discussing No. A22A1578).

93. The City was chartered in 2017. Ga. H.R. Bill 514, Reg. Sess. (2016).

94. *Joint Opinion*, at 8.

95. *Id.*

96. *Id.* at 9.

97. *Id.* at 9–10.

98. *Id.* at 13.

99. *Id.* at 14.

100. *Id.* at 16 (citing Spivey v. Mayson, 124 Ga. App. 775, 777, 186 S.E.2d 154, 155 (1971)).

This opinion is problematic. The administrative remedies for denial of a permit or plat are set forth in the city's zoning ordinance.[101] The appeal procedure for challenging the city's denial of Strategic's final plat are now set forth in Appendix D, Art. XI, Section 11.2.[102] However, the director approved Strategic's plat.[103]

The appeal procedure by which Parkview could challenge permit denial is set forth in Section 5-6009.[104] An appeal from the denial of a permit by the director goes to the city's Board of Appeals, with further appeal to superior court available.[105] Compliance with these provisions should be obvious upon submission of the city's zoning ordinance into evidence.[106] After remand, both cases remain active, and neither has been resolved.[107]

D. Inadmissibility of Similar Prior Conduct by the Local Government: City of Brookhaven v. The Ardent Companies, LLC

In *City of Brookhaven v. The Ardent Companies, LLC*,[108] the Ardent Companies (Ardent) wanted to develop property located on Bramblewood Road in the City of Brookhaven (the city) into townhome communities.[109] Ardent contracted for the purchase of the thirty-two existing single-family homes on Bramblewood Road for redevelopment. With its rezoning application, Ardent also requested that the city abandon Bramblewood Road which its appraiser valued at approximately $250,000. Commensurate with development, the city wanted to buy part of Ardent's property for a public safety facility, but an agreement on price could not be reached.[110]

Thereafter, the city notified Ardent that while it would not recommend abandoning Bramblewood Road, it would agree to abandon the road for a mere $3 million.[111] In response, Ardent modified its proposed site plan

101. *See* CITY OF SOUTH FULTON, GA., CODE OF ORDINANCES § 5-6009 (2018).

102. CITY OF SOUTH FULTON, GA., CODE OF ORDINANCES Appendix D, Art. XI, § 11.2 (2018). "There is no indication that Strategic's plat did not comply with either the requirements of O.C.G.A. § 15-6-67 or the City's development ordinance." *See* O.C.G.A. § 15-6-67 (2017).

103. *Joint Opinion*, at 3.

104. CITY OF SOUTH FULTON, GA., CODE OF ORDINANCES § 5-6009.

105. CITY OF SOUTH FULTON, GA., CODE OF ORDINANCES § 5-6009(c).

106. O.C.G.A. § 24-2-221 (2011).

107. *Docket Search*, COURT OF APPEALS OF THE STATE OF GEORGIA, https://www.gaappeals.us/docket-search/ [https://perma.cc/MW57-VHYL] (last visited Sept. 29, 2023).

108. No. A22A1540 (Ga. Ct. App., Dec. 28, 2022).

109. *Id.* at 2.

110. *Id.*

111. *Id.* at 3.

to include more apartments, townhomes, and commercial space. Further, the city urged Ardent to use a lower income number to qualify for affordable housing, with a clawback provision forcing Ardent to split profits therefrom with the city. Though not expressly stated in the opinion, Ardent's development request was denied, and it sued the city.[112]

A jury trial was conducted on Ardent's appeal in superior court.[113] At trial, Ardent sought to introduce evidence that previously the city had improperly threatened to exercise eminent domain when its offer to purchase another parcel of property was rejected. The jury found that the city's mayor and city manager acted with malice toward Ardent, tortiously interfered with Ardent's business and contracts, and acted in bad faith. Ardent was awarded attorney fees and punitive damages.[114]

The city appealed.[115] On appeal, the Court of Appeals of Georgia applied O.C.G.A. § 24-4-404(b) and held that the probative value of the evidence of the city's prior conduct was substantially outweighed by the danger of unfair prejudice.[116] The admission of the evidence was not deemed harmless error.[117]

This holding has evidentiary implications for mounting a successful evidentiary challenge alleging denial of equal protection. Denial of equal protection can only be proven by showing disparate treatment between a city's treatment of one parcel or developer and another as presented in *Wasserman*.[118] This means that evidence of the city's prior acts (as identified in *Ardent*) must be tendered.[119] Hopefully, the appellate courts in subsequent cases will recognize the evidentiary standard required to prove a violation of equal protection must be developed from prior actions of a local government, with the result that evidence of a city's previous conduct will be admitted.[120]

IV. DEPARTMENT OF COMMUNITY AFFAIRS ANNEXATION RULES AND

112. *See id.*

113. *Id.*

114. *Id.* at 3–4.

115. *Id.* at 4. The City also asserted that the doctrine of sovereign immunity applied. That argument is not addressed here.

116. *Id.* at 8–9; O.C.G.A. § 24-4-404(b) (2011).

117. *The Ardent Companies, LLC*, No. A22A1540 at 8.

118. 367 Ga. App. 694, 698, 888 S.E.2d 219, 224 (2023).

119. *The Ardent Companies, LLC*, No. A22A1540 at 7.

120. *Id.* at 9.

REGULATIONS.

On November 28, 2022, DCA adopted rules regarding the "procedure and operations of annexation arbitration panels."[121] Those rules became effective January 1, 2023.[122] The purpose of the rules is to establish an alternative dispute resolution process for reconciling interjurisdictional conflicts between and among Georgia's local governments, school systems, and private interests as such conflicts arise from the process of territorial annexation.[123] DCA rules establish the following process and requirements to resolve conflicts arising during annexations in Georgia.

The aggrieved party must first file a petition for annexation arbitration with DCA.[124] Upon receiving the petition, the DCA will review the petition to determine if it is eligible for annexation arbitration.[125] The following conditions must be met for eligibility: (a) the petitioner must be or must be authorized by the affected county government; (b) the petition must be complete and accompanied by the required supporting materials; and (c) the notice requirements in the petition must have been timely delivered.[126] Those notice requirements are: (a) within thirty days, a municipality that approved the annexation must notice the county and any impacted school system in which the territory to be annexed is located by verifiable delivery;[127] and (b) within forty-five days of receipt of the notice of annexation, the county may vote by majority to object to the annexation by delivering such objection to the municipality and DCA.[128]

Additionally, DCA must have jurisdiction over the matter.[129] In determining jurisdiction, the department looks at the following criteria:

> (1) Advances any arguments related to a potential material increase in burden upon the county resulting from change in proposed zoning or land use, proposed increase in density, and/or infrastructure demands related to the proposed change in zoning or land use. Objections failing to advance such arguments cannot be considered by an annexation arbitration panel.

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121. Ga. Comp. R. & Regs. §§ 110-12-8-.01–.04 (2022) (effective January 1, 2023).

122. *Id.*

123. Ga. Comp. R. & Regs. § 110-12-8-.01(2) (2022) (effective January 1, 2023).

124. Ga. Comp. R. & Regs. § 110-12-8-.03(1) (effective January 1, 2023).

125. Ga. Comp. R. & Regs. § 110-12-8-.03(2).

126. Ga. Comp. R. & Regs. §§ 110-12-8-.03(2)(a)–(c).

127. The rule provides that this notice of annexation must include the proposed zoning and land use for such area.

128. Ga. Comp. R. & Regs. §§ 110-12-8-.03(2)(c)(1)–(2).

129. Ga. Comp. R. & Regs. §§ 110-12-8-.03(2)(d).

> (2) Provides any information purporting to be evidence demonstrative of any potential financial impact that could result from the proposed annexation.[130]

After reviewing the application for the above met conditions, DCA may advance or decline to advance the petition for annexation arbitration.[131] If DCA declines to advance, they will notify the petitioning local government of the reason for denial, and the petitioning local government may "revise, amend, and perfect its petition and resubmit it for DCA's review if sufficient time remains to provide it via verifiable delivery to the municipal corporation and DCA prior to expiration of the forty-five (45) days allotted to the county for filing its Notice of Objection."[132]

If DCA accepts the petition for annexation arbitration, they will notify the following parties:

> The petitioning local government; The local government whose proposed action is the subject of the arbitration; The impacted school system; Other members from the local governments possibly including but not limited to the planning directors, the county and city manager, and the chief elected officials; Members of the Georgia Municipal Association and the Association of County Commissioners of Georgia; The planning director of the regional commission in which the subject property is located; Appropriate additional staff at [DCA]; [and] [q]ualified arbitration panelists from the municipal, county, and academic pools as provided by statute.[133]

Each government party shall also select one case coordinator.[134]

Once all parties have been notified, DCA shall begin the process for selecting and appointing the arbitration panel.[135] Specifically, DCA "will inform eligible individuals within the pools of panelists established for this purpose regarding the matter that their participation on a panel has been requested and ask them to confirm their availability and eligibility."[136] The necessary initial number of panelist is four from the county pool, four from the municipal pool, and three from the academic pool.[137] DCA will contact the city and county for strikes.[138] The

130. Ga. Comp. R. & Regs. §§ 110-12-8-.03(2)(d)(1)–(2).
131. Ga. Comp. R. & Regs. § 110-12-8-.03(2)(d)(2).
132. *Id.*
133. Ga. Comp. R. & Regs. § 110-12-8-.03(3).
134. *Id.*
135. Ga. Comp. R. & Regs. § 110-12-8-.03(4)(a).
136. *Id.*
137. Ga. Comp. R. & Regs. § 110-12-8-.03(4)(b).
138. *Id.*

municipality must strike two potential panelists from the county pool and the county shall strike two potential panelists from the municipal pool.[139] The municipality and the county must each strike one panelist from the academic pool and one alternate strike.[140] The municipality and county may use any criteria to strike a potential panelist, but may not contact any panelist.[141] Ultimately, the panel will be appointed consisting of the five potential panelists remaining unstruck after all strikes have been exhausted.[142]

The eligible panelists will be selected from an established group of possible participants and will meet the following requirements:

> A current elected official for a county or city or, someone who was an elected official for a county or city within the past six (6) years; or
>
> A person with a master's degree or higher in planning or an MPA, who is currently employed by an institution of higher learning in Georgia, other than the Carl Vinson Institute of Government of the University of Georgia; and
>
> They have attended the statutorily mandated training regarding annexation arbitration provided by the Carl Vinson Institute of Government. Such training shall include, among other things, content intended to facilitate panelist's compliance with applicable regulations and statute related to the conduct of meetings. All potential panel members must have attended this training;[143]
>
> No one from the pool of potential panelists should serve on a panel more than four (4) times in one (1) calendar year.[144]
>
> Panelists shall not participate in an arbitration panel if they currently live in the county which has interposed the objection, or any municipality located wholly or partially in such county.[145]

If, within fifteen days as provided by statute, there are not enough eligible panelists to serve on the arbitration panel, or if strikes were not provided to DCA within the requested timeframe, or if DCA is unable to fulfill the request, then DCA shall decline to appoint a panel, and there

139. Ga. Comp. R. & Regs. § 110-12-8-.03(4)(c).
140. *Id.*
141. *Id.*
142. *Id.*
143. Ga. Comp. R. & Regs. §§ 110-12-8-.03(5)(b)(1)–(3).
144. Ga. Comp. R. & Regs. § 110-12-8-.03(5)(c).
145. Ga. Comp. R. & Regs. § 110-12-8-.03(5)(d).

shall be no extension of timeline or waiver.[146] In such a case, DCA shall notify the parties and recommend that the objecting party consider seeking judicial resolution of the conflict, and DCA shall have no further obligations[147] The regulation is not clear on what claims an objecting party would assert in such an event and against whom.

If the panel is appointed, except in the event of the withdrawal or subsequent ineligibility of a panelist, DCA shall play not active role in the process.[148] The panel must meet to receive evidence and arguments from the parties, dictate the schedule of meetings, provide an opportunity for all affected parties to be present, and hold proceedings open to the public.[149] The panel may allow the public to comment, but the public may not, under any circumstance "impair, impede, interrupt, or otherwise frustrate the presentation of evidence and arguments by the local governments."[150] A "municipality may opt to maintain neutrality on a proposed annexation action and defer all advocacy in support of such an action to the applicant or property owner who has made such a proposal."[151]

During the meeting, only certain evidence is allowed to be presented.[152] Any evidence or arguments not relevant to the objection are beyond the panel's purview and may not be presented or entertained by the panel.[153] The evidence allowed to be presented must be related to:

> The existing local comprehensive plans of both the County and City; The existing land use patterns in the area of the subject property; The existing zoning patterns in the area of the subject property; Each jurisdiction's provision of infrastructure to the area of the subject property and to the areas in the vicinity of the subject property; Whether the county has approved similar changes in intensity or allowable uses on similar developments in other unincorporated areas of the County; Whether the county has approved similar developments in other unincorporated areas of the county which have a similar impact on infrastructure as complained of by the County in its objection; and Whether the infrastructure or capital outlay project

146. Ga. Comp. R. & Regs. § 110-12-8-.03(4)(d).
147. *Id.*
148. Ga. Comp. R. & Regs. § 110-12-8-.03(6).
149. *Id.*
150. *Id.*
151. Ga. Comp. R. & Regs. § 110-12-8-.03(7).
152. *Id.*
153. *Id.*

> which is claimed adversely impacted by the county in its objection was funded by a county-wide tax.[154]

Additionally, the parties must provide supporting evidence that their position is consistent with the local comprehensive plan and the pattern of existing land uses and zonings in the area of the property, which may include, but not be limited to, adopted planning documents and capital or infrastructure plans.[155]

After the panel has held a meeting, and heard all the evidence and arguments, they must deliberate and make decisions on the outcome of the arbitration.[156] "This may occur in one or more meetings, as determined by the panel. This may occur during the same meeting as the meeting(s) within which evidence and argument are presented, but it is not necessarily so."[157] The final decision of the panel must be decided by a majority vote of the five panelists.[158] When voting, "[a]ll votes shall be 'Yay' or 'Nay' with no abstentions permitted."[159]

> The municipal or county governing authority or an applicant for annexation may appeal the decision of the panel by filing an action in the superior court of the county within 10 days from the verified receipt date of the panel's findings. The sole grounds for appeal shall be to correct errors of fact or of law, the bias or misconduct of an arbitrator, or the panel's abuse of discretion.[160]

V. STATE V. SASS GROUP

In *State v. Sass Group*,[161] the Supreme Court of Georgia considered the newly enacted Article I, Section II, Paragraph V(b) of the Georgia Constitution of 1983 (Paragraph V) and held that it "means what it says" and "requires dismissal of a lawsuit brought under that paragraph against the State [or a local government] if [that suit] names defendants other than the State or local governments."[162] Paragraph V provides that:

> 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

154. *Id.*
155. *Id.*
156. Ga. Comp. R. & Regs. § 110-12-8-.03(8).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. 315 Ga. 893, 885 S.E.2d 761 (2023).
162. *Id.* at 894, 885 S.E.2d at 764.

> 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.[163]

Under Paragraph V, after a court awards declaratory relief, the court may issue the injunctive relief necessary to enforce its judgment and sovereign immunity is waived to that extent.[164] The waivers of sovereign immunity under this provision "apply to past, current, and prospective acts which occur on or after January 1, 2021."[165]

Any acts brought under Paragraph V must only be brought in the name of the governmental entity at issue.[166] In other words, an action alleging that a local government elected or appointed official acted unconstitutionally must name only the local government.[167] And, "[a]ctions filed pursuant to [Paragraph V] naming as a defendant any individual, officer, or entity other than as expressly authorized under this Paragraph shall be dismissed."[168] Additionally, "[n]o damages, attorney's fees, or costs of litigation shall be awarded in an action filed pursuant to this [provision], unless specifically authorized by Act of the General Assembly."[169]

In *Sass Group*, producers of hemp-derived products (the Producers) brought an action against the State of Georgia and the Gwinnett County District Attorney seeking "declaratory judgment affirming the legality of their actions and injunctive relief to protect their future commercial activities."[170] Their suit was in response to the district attorney's press release stating it would prosecute anyone who sells or possesses Schedule 1 controlled substances, which it said included the products manufactured by the Producers.[171]

The State filed a motion to dismiss the suit, claiming it was barred by sovereign immunity because Paragraph V did not apply to the plaintiffs' case since both the District Attorney and the State of Georgia were

163. Ga. Const. Art. I, Sec. II, Para. V(b)(1).
164. *Id.*
165. *Id.*
166. Ga. Const. Art. I, Sec. II, Para. V(b)(2).
167. *Id.*
168. *Id.*
169. Ga. Const. Art. I, Sec. II, Para. V(b)(4).
170. 315 Ga. 893, 894, 885 S.E.2d 761, 764 (2023).
171. *Id.* at 895, 885 S.E.2d at 764.

named defendants.[172] The trial court denied the State's motion to dismiss.[173]

On appeal, the Georgia Supreme Court engaged in constitutional interpretation to determine whether the word "action" in Paragraph V meant either a claim or cause of action, or the entire case or lawsuit.[174] The court held "that 'action' in Paragraph V refers to a lawsuit as a whole rather than a claim in a lawsuit."[175] Therefore, in a complaint seeking declaratory relief regarding an alleged unconstitutional act of a local government, naming any entity or person other than the local government is fatal.[176] Additionally, in dicta, the court opined that since "action" means the entire lawsuit, an "action" brought under Paragraph V may only contain a claim for declaratory relief and no claim for damages, attorney's fees, or costs of litigation.[177] This effect is a natural reading of Paragraph V and, in the former respect, one that was recognized in a prior version of this Survey Article.

The court's interpretation of Paragraph V has broad-reaching effects in that it means a zoning appellant must bring multiple actions—one for declaratory relief under Paragraph V and one (or more) for all other claims.[178] As the Plaintiffs in *Sass Group* noted,

> [I]f 'action' in Paragraph V means the whole lawsuit, then Paragraph V requires plaintiffs who wish to rely on its waiver to file a lawsuit containing only a claim or claims for declaratory relief against 'the State.' Any other related claims . . . must be filed in a separate lawsuit, or the entire lawsuit will be dismissed[,] even if the related claims do not rely on Paragraph V's waiver.[179]

VI. CONCLUSION

With its denial of the writ of certiorari in *Schroeder,* the Georgia Supreme Court has halted the transformation of legislative zoning decisions into quasi-juridical proceedings for now. Coupled with the elimination of the writ of certiorari procedure required to appeal the decisions of local governments to the superior court, the merits of the rezoning decision can again be the focus of the parties and the courts, rather than appeal procedure. However, the decision in *Sass* will create

172. *Id.* at 895, 885 S.E.2d at 765.
173. *Id.*
174. *Id.* at 897–99, 885 S.E.2d at 766–67.
175. *Id.* at 902, 885 S.E.2d at 769.
176. *Id.* at 896–97, 885 S.E.2d. at 765–66.
177. *Id.* at 901, 885 S.E.2d at 768.
178. *Id.* at 897, 885 S.E.2d. at 766.
179. *Id.* at 902, 885 S.E.2d at 769.

more procedural issues regarding how the parties to a zoning appeal or other litigation must be identified and in what capacities.