Zoning and Land Use Law in Georgia: Where We Are, How We Got Here, and Where We Are Going

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I. Introduction

This paper and the author's talk are intended to provide the audience with a framework of the basic concepts of zoning law and the effects the recent recession and shifting housing preferences will have on our zoning and land use systems. We have recently witnessed one of the worst economic downturns in our nation's history, fueled in large part by the collapse of the housing market. Over the last three years we have seen an extremely slow recovery with almost no growth in the real estate and construction sectors of our economy. Even now, with the recession technically behind us, we are still watching our local economies and real estate industries struggle to regain their pre-recession vigor.

The land use and zoning arena will change considerably in the next several years as we continue to figure out how to best balance the rights of private property owners with the public health, safety, morals and general welfare. This balance proved considerably difficult to strike in our recent recession, and will continue to be difficult to strike as we continue to recover. Most of the changes in zoning laws will be in direct response to our aging population, changes in housing preferences, and our diversifying demographic makeup. To accommodate these changes, conventional zoning codes which envision the strict separation of land uses will give way to more flexible and dynamic regulations. The rejection of conventional zoning raises interesting implications and questions for the future of our land development patterns over the next few decades.

Moreover, perceived deterrents to development, such as excessive impact fees, tree ordinances, stormwater ordinances and robust stream buffers, may be tested as developers and landowners challenge these regulations as overly burdensome and deterrents to growth. Local governments will face conflict on how to proceed in this post-recession era. On the one hand, local governments may be more hesitant to freely issue building permits and other land development approvals due to an over-saturated

market and unnecessary infrastructure. On the other hand, however, local governments will want to encourage building and real estate development as an engine for economic growth and development.

This paper begins with a very brief overview of zoning and land use law and how Georgia's regulatory framework has evolved over the years. Next, the paper discusses the need for increased flexibility in land use and zoning codes due to changing demographic conditions and housing preferences. The paper concludes with a discussion of deterrents to development and changes that could be made to these land use control tools to balance the needs of the public with the benefits of new development.

II. A Brief History of Zoning and Land Use Law in Georgia

Local land use and zoning regulations came into existence at the turn of the twentieth century concurrent with the rise of industrialization and the mass migration of people from farms to urban centers in search of jobs. Factories in this era were of a much larger size and scale than they previously had been. The smoke and noise generated by these factories and industrial properties had significant negative impacts on residential neighborhoods and quality of life. Nuisance suits, restrictive covenants and building codes were used to abate and mitigate the hazards and impacts of new development, but these uncoordinated attempts to control land development often led to "undesirable haphazard development that resulted in various economic impacts."[1]

In response to these negative externalities, states, including Georgia, began allowing local governments to zone property by geographically separating land uses. Zoning, or the geographical separation of land uses into zones, therefore emerged as the logical solution of the day to help improve the quality of life in our polluted, overcrowded cities. The theory of zoning was that the separation of land uses would help ensure that one use did not adversely affect another use. In 1921, the Georgia Legislature amended the City of Atlanta's Charter and for the first time granted a city in

[1] Patricia Salkin, The Quiet Revolution and Federalism: Into the Future, 45 *J. Marshall L. Rev*. 253, 264 (2012).

Georgia the power to zone.[2] Five years after the delegation, however, the Georgia Supreme Court in *Smith v. City of Atlanta*[3] struck down Atlanta's zoning ordinance as an unconstitutional taking of private property. This initial setback to zoning would be short-lived.

The same year *Smith* was decided, the U.S. Supreme Court in the seminal case of *Village of Euclid v. Ambler Realty*[4] upheld the validity of zoning laws as a valid exercise of a state's police power.[5] Thus was ushered in a new era of governmental intervention and regulation in the zoning and land use arena. Though zoning was upheld as constitutional by the U.S. Supreme Court, local governments in Georgia were still hesitant to enact zoning laws. After a series of piecemeal delegations of the zoning power to certain local governments, the Georgia Legislature in 1983 constitutionally delegated to all local governing authorities the power to zone property.

III. The Advent of More Flexible Zoning Codes and the Legal Ramifications of Increased Flexibility

A new generation of decision makers in the land use arena is grappling with how to best strike a balance between encouraging growth and innovative development, while protecting and sustaining our natural resources, single-family residential neighborhoods, historic properties and the like, all while in the midst of a prolonged economic recovery. To accommodate the changing preferences and needs of communities, local governments must provide greater regulatory flexibility than current Euclidean models afford.

Euclidean zoning, or use zoning, has been the predominate form of zoning for the last century. This form of zoning envisions a system where incompatible land uses are separated through the use of "fixed legislative rules that would be largely self-administering" and restrictions in each zone would be "uniform for each class or kind of

[2] *Smith v. City of Atlanta*, 161 Ga. 769, 132 S.E. 66 (1926).
[3] 161 Ga. 769, 132 S.E. 66 (1926).
[4] 272 U.S. 365, 47 S.Ct. 114 (1926).
[5] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct 114 (1926).

building in each district."[6] In general, Euclidean zoning controls regulate land use and building height and bulk through setback lines, minimum lot sizes, and permissible floor area ratios. The Euclidean form of zoning began to be seriously questioned in 1993 when the Congress of New Urbanism first met to advocate for more walkable communities of mixed land uses built on a pedestrian scale similar to the towns and villages that existed prior to introduction of the automobile. While separating industrial and other potentially noxious uses from residential land uses still makes sense, mixing residential office, retail, and other commercial land uses and allowing for a variety of housing choices in a district (townhomes, single-family detached and apartments) is now viewed as part of the solution to creating vibrant living places. Moreover, rising energy prices and increasing congestion will increase the demand for developments that offer live-work options, less driving, and greater transportation alternatives.[7]

A. Mixed Use Districts and "Age in Place" Zoning

Over the last several years, we have seen a significant shift in housing preferences among younger and older generations. The most marked shift we have seen in the last decade has been an increased demand for mixed use development as Generation Y and the Baby Boomers increasingly seek out housing in more compact urban settings, with easy access to coffee shops, restaurants, health care services and entertainment, as opposed to traditional gated, suburban large lot developments.[8] In his new book *Reshaping Metropolitan America*, Arthur (Chris) Nelson places significant emphasis on Generation Y and the Baby Boomer generation, noting that these two generations' demand for mixed use, walkable communities with transit access will be the driving force behind future land development patterns in metropolitan areas.[9]

Mixed use districts combine land uses to create a master community with residential areas adjacent to commercial areas, office-institutional areas, and even some light

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[6] Zeigler, 1 *Rathkopf's The Law of Zoning and Planning,* § 1:5.
[7] Arthur C. Nelson, *Reshaping Metropolitan America: Development Trends and Opportunities to 2030*. Island Press. p. 30.
[8] *See* 1 Rathkopf's The Law of Zoning and Planning, § 11:12.
[9] Arthur C. Nelson, *Reshaping Metropolitan America: Development Trends and Opportunities to 2030*. Island Press. p. 30.

industrial uses. The idea behind the mixed use concept is that an individual would be able to live, work, and "play" in the same area rather than commuting to three separate places to enjoy the same. Such developments are often characterized by people living in close proximity to one another in housing designed to encourage social interaction. Cars are de-emphasized and commercial and office land uses are located in close proximity to residential uses. Small and large-scale mixed use developments are accommodated through the utilization of special mapped or overlay districts.[10] These districts generally provide a set of development, performance, and design standards that are specifically tailored to a particular area to deal with potentially incompatible land uses and to comply with comprehensive development plans for future growth.[11]

In addition to this shift toward mixed use development, we will likely continue to see a shift toward renting versus homeownership over the next decades as people grow increasingly disillusioned with the notion of homeownership or are unable to attain homeownership status because of post-recession credit tightening. Many homeowners lost a sizeable amount of wealth in their homes during the recession as the market value of their homes dramatically decreased. Many found themselves "underwater," paying more on their mortgages than their homes were worth. These homeowners, as well as those who witnessed friends and family members go through foreclosure during the recession, may be less likely to purchase a home in the future and opt to rent instead. In *Reshaping Metropolitan America*,[12] Nelson predicts rental housing will constitute approximately 75% of new demand in the market for the next twenty years, with owner housing accounting just 25% of new demand,[13] largely as a consequence of changing housing preferences and disillusionment with homeownership. Many local zoning ordinances specifically exclude rental housing in certain or all zoning districts. We expect zoning laws written to exclude housing on the basis of ownership status (i.e. "for

[10] *See* Zeigler, 1 *Rathkopf's The Law of Zoning and Planning*, § 11:12.
[11] *Id.*
[12] Arthur C. Nelson, *Reshaping Metropolitan America: Development Trends and Opportunities to 2030*. Island Press. p. 27.
[13] Arthur C. Nelson, *Reshaping Metropolitan America: Development Trends and Opportunities to 2030*. Island Press. p. 27, 30-31.

sale" residences versus "for rent" residences) will be challenged within the next few years on constitutional and statutory grounds.

Furthermore, "age in place" zoning will become a major topic of debate in the coming years as the Baby Boomer Generation becomes senior citizens. It is predicted that the Baby Boomers will account for nearly 20% of the national population by 2030.[14] The aging Boomers present one of the greatest challenges to current land use and zoning paradigms. Local jurisdictions are currently in the midst of a serious dilemma with their aging populations as most prefer to "age in place" and downsize into smaller homes or apartments within their communities, rather than move away from their established social networks to find smaller housing, but cannot do so because of strict zoning regulations allowing only single-family residential detached homes with expansive minimum square footage requirements. To address this issue, some progressive jurisdictions have amended their zoning ordinances to allow for a variety of housing choices in residential zoning districts, such as smaller single-family residential houses, townhomes, and apartments, so that seniors can downsize and remain in their communities.

B. Land Use Tools for Increasing Flexibility

Perhaps in response to the harsh rigidity of Euclidean zoning, new zoning techniques and types of zoning districts have been developed and implemented to inject flexibility into current zoning structures. We now have floating zones, mixed use development districts, special public interest districts, and a variety of overlay districts that have added flexibility, and a great deal of complexity, to our current zoning codes. Special public interest districts may be the most flexible and sustainable tool at the disposal of local governments looking to further specific policies. Special public interest (SPI) districts are tailored to meet the specific needs of a particular community and generally attempt to ensure that new development in an area furthers general welfare policies.[15] These districts are superimposed on an already existing zoning classification

[14] *Id.*
[15] *See* Zeigler, 1 *Rathkopf's The Law of Zoning and Planning*, § 11:10.

so that new restrictions and uses are imposed on the property similar to overlay districting, either supplanting the existing zoning restrictions or modifying these regulations depending on the intent of the local legislative body in adopting an SPI ordinance.[16]

Overlay zoning districts have now been adopted and codified in many metropolitan Atlanta jurisdictions. Overlay districts are placed over one or more existing base zoning districts, such as a commercial or office-institutional districts, and may impose additional restrictions on permitted uses or development regulations (i.e. setbacks, height, etc.) or impose new design guidelines on streetscapes, building facades, landscaping and the like. The appeal of overlays is their flexibility. Overlays allow governments to maintain current zoning regulations while addressing the unique needs of particularly susceptible areas.

Overlay districts are created and governed by local ordinance and must be approved by a local governing authority. The local ordinance will specify what effect the overlay has on the existing restrictions in the underlying district, and the geographic boundary in which the overlay operates. It is important to note that overlay zoning districts do not replace underlying base zoning districts and should not permit a land use that is otherwise prohibited by the base zoning district. Many jurisdictions are broadly interpreting overlay zones as substantive zoning districts that are separate and apart from the underlying use and development restrictions in the base zoning district. This interpretation leads to problems and legal challenges if the overlay zoning district permits a land use that is prohibited in the underlying base district.

While flexibility in zoning ordinances is needed to ensure that the ordinance remains dynamic over time, finding the right balance between allowing for change over time without destroying the essential elements of a zoning ordinance has proven elusive for some local governments. The zoning power may only be exercised for the health, safety and welfare of the public and must not infringe too heavily upon constitutional

[16] *See e.g.* Atlanta Mun. Ord., § 16-18.002 (stating that SPI districts shall "supplant districts existing at the time of the creation of the SPI district" or modify requirements existing in districts depending on the SPI's statement of intent).

safeguards. The zoning power is subject to the state and federal constitutional prohibitions against taking private property for public use without just compensation,[17] equal protection,[18] requirements for due process,[19] and freedom of speech and religion,[20] among other things.

The law in Georgia is that a zoning classification is presumed valid.[21] This presumption of validity can be overcome by clear and convincing evidence that the property owner has suffered a significant deprivation insubstantially related to the public health, safety, morality, or welfare (taking),[22] the ordinance is not substantially related to a legitimate governmental purpose (due process), or the zoning treats similarly situated persons dissimilarly (equal protection). The burden of proof is on the property owner to establish by clear and convincing evidence that the existing zoning bears an insubstantial relationship to the public interest.[23] If the property owner meets its burden, the governing authority must then introduce evidence showing the existing zoning is reasonably related to the public interest.[24] If a rational relationship does not exist, the zoning will be invalidated. In a takings challenge, once the city justifies its zoning as reasonably related to the public interest, the court will weigh the public benefit of the existing zoning against the detriment to the property owner.[25]

IV. Increased "Barriers" to Development: Balancing the Detriment to Landowners with the Benefit to the Public Health, Safety, Morals and Welfare

In addition to zoning regulations, there exists an abundance of other land use regulatory tools at the disposal of local governments. Many of these tools have been

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[17] U.S. Const. amend V; Ga. Const. of 1983 Art. I, § III, ¶ I.
[18] U.S. Const. amend XIV; Ga. Const. of 1983, Art. I. § I, ¶ II.
[19] U.S. Const. amend V, XIV; Ga. Const. of 1983 Art. I, § I, ¶ I.
[20] U.S. Const. amend I; Ga. Const. of 1983 Art I, § I, ¶ V, IV.
[21] *Town of Tyrone v. Tyrone, LLC*, 275 Ga. 383, 565 S.E.2d. 806 (2002).
[22] *Gwinnett County v. Davis*, 268 Ga. 653, 492 S.E.2d. 523 (1997); *Gradous v. Board of Comm'rs*, 256 Ga. 469, 471, 349 S.E.2d. 707 (1986); *Barrett v. Hamby*, 235 Ga. 262, 265, 266, 219 S.E.2d 399 (1975) (stating that the "individual's right to the unfettered use of his property confronts the police power under which the zoning is adopted, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or welfare.").
[23] *Henry County v. Tim Jones Properties*, Inc., 273 Ga. 190, 193, 539 S.E.2d. 167 (2000).
[24] *City of Roswell v. Heavy Machines Co.,* 256 Ga. 472, 474, 349 S.E.2d. 743 (1986); *Gradous v. Board of Comm'rs*, 256 Ga. 469, 471, 349 S.E.2d. 707 (1986)
[25] *City of Atlanta v. TAP Associates*, *LP*, 273 Ga. 681, 683, 544 S.E.2d. 433 (2001).

challenged and upheld as valid exercises of the police power, and others have yet to be reviewed by our courts. Though these regulations may be enacted to serve a public purpose, their practical effect may be to further delay recovery and slow land development.

A. Tree Ordinances

Tree preservation ordinances are not zoning ordinances; they are properly considered land use ordinances.[26] Tree ordinances were enacted as a backlash to the building boom that preceded the recession when developers were clear-cutting lots. In enacting tree ordinances, many local governments cite to environmental, aesthetic and urban design considerations. For example, the City of Atlanta Tree Ordinance states as its purpose to ensure that the city will "continue to enjoy the benefits provided by its urban forest."[27] In jurisdictions that have adopted tree preservation ordinances, property owners are typically required to seek permission from a local government before removing, relocating, or in any way harming a tree. As tree preservation ordinances become more prevalent public land use control tools, local officials must consider the limitations on such ordinances. Specifically, takings and due process challenges abound in this area as it is alleged that a tree ordinance destroys valuable rights in property and the public health, safety and welfare is not being served by its enforcement. These ordinances may also be detrimental to the health, safety and welfare of the community if older trees, in danger of falling, are left in place while property owners go through the lengthy permit and paperwork procedures required to remove such trees.

In 2003, the Georgia Supreme Court upheld the constitutionality of DeKalb County's tree preservation ordinance in the case of *Greater Atlanta Homebuilders Association v. DeKalb County*.[28] In that case, the property owners brought a facial challenge to the DeKalb County Tree Ordinance and argued that the ordinance

[26] *See Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 277 Ga. 295, 295, 588 S.E.2d. 694 (2003)
[27] Atlanta Mun. Ord., § 158-28.
[28] 277 Ga. 295, 588 S.E.2d. 694 (2003).

unconstitutionally took property from them without just compensation.[29] The Georgia Supreme Court upheld the constitutionality of the tree ordinance. Since the ordinance only regulated the manner in which new and existing trees must be *managed*, and did not destroy an owner's ability to develop his or her property, no taking had occurred.[30] While the tree ordinance may have imposed additional costs, the Court stated that "[m]any regulations restrict the use of property, diminish its value or cut off certain property rights, but no compensation for the property owner is required."[31] To our knowledge, the issue of whether a tree ordinances may constitute an unconstitutional exaction[32] *as applied* to a property has yet to be tested in any Georgia court.

B. Stormwater Ordinances

Stringent stormwater ordinances serve as another deterrent to development. Recent amendments to stormwater ordinances in Georgia have made development and redevelopment incredibly expensive as most ordinances now require that post-development stormwater runoff be no greater than pre-development runoff. We have recently even seen post-development stormwater management ordinances passed in Georgia that require a twenty to thirty percent reduction in post-development stormwater runoff as compared to pre-development levels. This means developers will have to invest heavily in detention ponds, special landscaping and other runoff mitigation measures, which will inevitably drive up the costs of development.

There has also been a general acceptance of "green infrastructure" in existing stormwater management ordinances. Though the definition of "green infrastructure" varies by jurisdiction, generally speaking "green infrastructure" incorporates vegetation, soils and natural processes in design standards to manage water runoff. "Green infrastructure" may include rain gardens, rainwater catchment or harvesting systems, bioretention or green roofs on buildings. Depending on the jurisdiction, landowners

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[29] *Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 277 Ga. 295, 295, 588 S.E.2d. 694 (2003).
[30] *Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 277 Ga. 295, 297-298, 588 S.E.2d. 694 (2003).
[31] *Id.*
[32] Exactions represent a distinct category of takings where a government conditions its grant of permit, plat, or some other form of governmental approval on an exaction from the landowner applicant.

may bear the responsibility for incorporating "green infrastructure" into development plans.

C. Development Impact Fee Ordinances

Impact fees are "charges levied by local governments on new developments in order to pay a proportionate share of the capital costs of providing public infrastructure to those developments."[33] Impact fees shift a proportion of the infrastructure costs and burdens associated with new development away from local governments and onto developers. In Georgia, the Georgia Development Impact Fee Act (DIFA) authorizes the assessment of local fees upon development to fund a proportionate share of the public infrastructure needed to serve the new growth in designated service areas.

Some argue that impact fees deter new development, though specific research and statistics on this contention are lacking. It is true that development impact fees add to the cost of new development as developers are forced to bear some of the associated infrastructure costs. However, it is unclear whether waiving or reducing impact fees would significantly spur development, and spur it enough to offset the costs of waiving the fees to a local government. Many counties and municipalities around the country have amended their impact fee laws in light of the recent recession by placing temporary moratoria on the imposition of impact fees, collecting the fees in installments rather than all up front, or simply by reducing the amount of the impact fee charged upon development approval.

D. Form-Based Codes/Transfer Of Development

Form-Based Code ("FBC") is defined as "a method of regulating development to achieve a particular urban form." FBCs create a predictable public realm by controlling physical form primarily with a lesser focus on land use through city or county regulations. This is not a new concept, though it is relatively new to Georgia. FBCs have been adopted primarily by those communities transcending from historical suburban

[33] Julian C. Juergensmeyer and Thomas Roberts, *Land Use Planning and Development Regulation Law 2d*., § 9.9.

areas to more urban activity centers, particularly the new cites being created around the Atlanta region. The problem with current FBC programs is that they are being used to regulate land use and density, as well as architectural and development styles.

Most FBCs do separate the more urban centers from suburban or agricultural areas. The idea that we maintain the agricultural or low density areas from the more urban centers is accomplished by developing a linier or circular growth boundary that provides for a mix of uses and predetermined and regulated densities. This is accomplished by transferring the development rights in the suburban or rural area to the urban center.

> ***Example***: An agriculture zone gives the owner 1 residential unit per acre. Within the growth ring, the developer/owner can develop 6 units per acre by right and 12 units per acre using TDRs.

However, if the local government doesn't have a bank of TDRs for sale and there is no public or private fund for the sale of TDRs, then the developer can only develop 6 units to the acre. So with the adoption of the FBC and the TDR program, the local government has reduced/eliminated development making it uneconomical or impossible to develop within the urban area.

This could be unconstitutional under both the Georgia and U.S. Constitutions by taking a valuable property right without first paying fair, adequate, and just compensation, all in violation of the substantive due process and equal protection provisions of both the 5th and 14th Amendments to the Georgia and U.S. Constitution.

To our knowledge, FBCs are yet to be tested in any court in Georgia.