

GAZA Summer Conference


**Zoning Appeals, Adult Entertainment,
Short Term Rentals, Build To Rent,
and Sundry Other Exigent Issues.**

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**The Zoning Procedures Law
and Petitions for Review**

**First, a moment of silence
for the writ of certiorari...**



City of Cumming v Flowers, 300 Ga. 830 (2017);

Schumacher v City of Roswell, 301 Ga. 635 (2017);

**Diversified Holdings, LLP v. City of Suwanee;
302 Ga. 597 (2017).**



O.C.G.A. § 36-66-3

(4) "Zoning decision" means final legislative action by a local government which results in:
(A) The adoption or repeal of a zoning ordinance;
(B) The adoption of an amendment to a zoning ordinance which changes the text of the zoning ordinance;
(C) The adoption or denial of an amendment to a zoning ordinance to rezone property from one zoning classification to another;
(D) The adoption or denial of an amendment to a zoning ordinance by a municipal local government to zone property to be annexed into the municipality;
(E) The grant or denial of a permit relating to a special use of property; or
(F) The grant or denial of a variance or conditions concurrent and in conjunction with a decision pursuant to subparagraphs (C) or (E) of this paragraph.



O.C.G.A. § 36-66-3

(1.1) "Quasi-judicial officers, boards, or agencies" means 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.



O.C.G.A. § 36-66-4

(g) A local government delegating decision-making power to a quasi-judicial officer, board, or agency shall provide for a hearing on each proposed action described in paragraph (1.1) of [Code Section 36-66-3](#). Notice of such hearing shall be provided at least 30 days prior to the quasi-judicial hearing, with such notice being made as provided for in subsection (a) of this Code section and with additional notice being mailed to the owner of the property that is the subject of the proposed action.



O.C.G.A. § 36-66-4

(h)(1) ...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 ...such zoning decision must be adopted in the following manner:

- 2 regular meetings not less than 21 days apart
- 2 (additional) public hearings at least 3 months before final action
- does not apply when initiated by the owner



O.C.G.A. § 36-66-5 Policies, Procedures and Standards for the Exercise

(b.1) In addition to policies and procedures required by subsection (a) of this Code section, each local government providing for a quasi-judicial officer's, board's, or agency's grant, denial, or review of a quasi-judicial matter may adopt specific standards and criteria governing the exercise of such quasi-judicial decision-making authority, and such standards shall include the factors by which the local government directs the evaluation of a quasi-judicial matter. Such standards shall be printed and copies thereof made available for distribution to the general public.



O.C.G.A. § 36-66-5.1

(1) Zoning decisions as described in this chapter, being legislative in nature, shall be subject to direct constitutional challenge 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 pursuant to Chapter 4 of Title 9 and equity jurisdiction under Title 23. Such challenges shall be by way of a de novo review by the superior court wherein such review brings up the whole record from the local government and all competent evidence shall be admissible in the trial thereof, whether adduced in a local government process or not and employing the presumption 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; or



O.C.G.A. § 36-66-5.1

(2) Quasi-judicial decisions as described in this chapter and zoning decisions under subparagraph (E) of paragraph (4) of **Code Section 36-66-3** shall be subject to appellate review by the superior court pursuant to its appellate jurisdiction from a lower judicatory body and shall be brought by way of a petition for such review as provided for in Title 5. Such matters shall be reviewed on the record which shall be brought to the superior court as provided in Title 5.



O.C.G.A. § 36-66-5.1

(d) An appeal or challenge by an opponent filed pursuant to this chapter shall stay all legal proceedings in furtherance of the action appealed from or challenged, unless the local government, officer, board, or agency from which or from whom the appeal or challenge is taken certifies that, by reason of the facts stated in the certificate, a stay would cause imminent peril to life or property. In such actions, the applicant for the zoning decision or the quasi-judicial decision shall be a necessary party and shall be named as a defendant in the action and served in accordance with the requirements of Title 5 or Title 9, as appropriate.



Effective Dates

HB 1405: This Act shall become effective on July 1, 2022, and shall apply to all zoning and quasi-judicial decisions occurring on and after that date; however, no zoning or quasi-judicial decision prior to July 1, 2023, shall be rendered invalid or void because of a local government's failure to implement language in their ordinances accomplishing the provisions of Code Section 36-66-5.1.

HB 916: This Act shall become effective on July 1, 2023, and shall apply to petitions for review filed in superior or state court on or after such date.



HB 916


Applies to:
Special Use Permits
Variations
Administrative Appeals

But not rezoning decisions (because they are legislative)



Key provisions...


O.C.G.A. 5-3-3 (11)(B)&(C)- Respondent for decisions by a city board is the city; for county decisions, it is the county.



OCGA 5-3-5(a)

Except as provided... a reviewing court shall:

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



OCGA 5-3-7(b)

Petition for review must be filed within 30 days after the final judgment is:

Signed and notice of the final judgment has been provided to all parties, if the lower judiciary does not have a clerk; or

Filed or recorded, whichever first occurs, if the lower judiciary has a clerk.

Note that the filing date can be extended by the Superior Court for up to 30 days.

O.C.G.A. 5-3-11(b)



Transcripts – OCGA 5-3-14

- a. Local government may require audio or video recording or transcribing of evidence and proceedings.**
- b. Local government may require the parties to share the cost of reporting or transcribing the evidence and proceedings (except where they are unable to pay).**
- c. If no transcript is made, it gets complicated...**



OCGA 5-3-15

Upon service, clerk of lower body is supposed to retain the original record and send a copy to the superior court with 30 days.

If no record is available, must notify the lower judiciary so they can prepare a record.



TAKE HOME MESSAGE

- 1. The appeal of a rezoning decision is the same as it used to be... a de novo bench trial in front of the Superior Court. The legal standard also remains the same: whether the existing zoning is a significant detriment to the property which is not justified by a substantial public benefit.
- 2. The appeal of a special use permit is record review.
- 3. Appeals of variances and decisions on administrative appeals are also record reviews.
- 4. Record review means that it is incumbent upon the party who wishes to appeal to make sure that she gets her evidence in the record prior to the decision being made. Having a transcript or at least a recording of the hearing is also a good idea.



- 5. The rule of raising constitutional objections still applies to all zoning decisions up for appeal.
- 6. There is a new notice and hearing procedure for quasi-judicial zoning decisions.
- 7. Where there is a delegation of zoning power to an official or board, then there needs to be policies and procedures that apply, and also standards and criteria that guide the decision.
- 8. The new law is in effect now.
- 9. Certiorari is gone.



Adult Entertainment


First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech,** or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



Secondary Effects

- **Strict Scrutiny vs Intermediate Scrutiny**
- **What kind of secondary effects are there?**
- **Importance of Studies and Evidence**




How can we address secondary effects?

- **No alcohol sales**
- **License requirements (to identify people with a propensity for criminal behavior)**
- **Bright lights**
- **No small or “contact” rooms.**
- **Distance from interstates.**




The Importance of Definitions

**“I know it when I see it.” Justice Potter Stewart,
Jacobellis v Ohio, U.S. Supreme Court, 1964
(defining hard core pornography is... hard)**




Adult bookstore or adult video store means a commercial establishment which, as one of its principal purposes, offers for sale or rental for any form of consideration any one or more of the following items: books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, videocassettes, compact discs, digital video discs, slides, or other visual representations which are characterized by their emphasis upon the display of "specified sexual activities" or "specified anatomical areas."




Specified anatomical areas means and includes:

- (1) Less than completely and opaquely covered: human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and
- (2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.




Sexual device shop means a commercial establishment that regularly features sexual devices. [which is also defined, in express detail] Nothing in this definition shall be construed to include any pharmacy, drug store, medical clinic, or any establishment primarily dedicated to providing medical or healthcare products or services, nor shall this definition be construed to include commercial establishments which do not restrict access to any portion of their premises by reason of age.




Principal purpose means that the commercial establishment:

- (1) Has a substantial portion of its displayed merchandise which consists of said items;
- (2) Has a substantial portion of the wholesale value of its displayed merchandise which consists of said items;
- (3) Has a substantial portion of the retail value of its displayed merchandise which consists of said items;
- (4) Derives a substantial portion of its revenues from the sale or rental for any form of consideration of said items;
- (5) Maintains a substantial section of its interior business space for the sale or rental of said items; or
- (6) Regularly features said items, and prohibits access by minors, because of age, to the premises or the portion of the premises occupied by said items, and regularly advertises itself as providing "adult," "xxx," "triple-x," "x-rated," "sex," "sexual," "pornography," "porn," or "erotic" material on signage visible from a public right-of-way.



Regularly means and refers to the consistent and repeated doing of the act so described.

Substantial means at least 35 percent of the items so modified.




Permission by Right

- **Special Use Permits**
- **Exclusionary distance requirements**




Procedure

- Licenses and permits are issued within a short, stated period of time (say 5 days)
- Appeal mechanism



What happens if you get sued and lose?
Section 1983 attorney fees
damages




Build to Rent

First, a poll.

Who regulates it? Does anyone outright prohibit?

Why?


How?



A Little Market Data...

- 14,541 BTR single family homes built in 2022
- 44,700 BTR houses under construction.
- Those are record numbers, more than twice as much as prior years (ranging between 6,000 and 7,500 in prior years).
- Occupancy is 97%, higher than the 95% apartment occupancy rate.

RentCafe, Mat 30, 2023



Why?

- Flexibility and freedom.
- Space and comfort of a home.
- Lawn and property maintenance.




Considerations

Is this better or worse than neighborhoods with a mixture of owners and renters, or with a variety of landlords?


What impact does this have on home ownership, and what long-term impact on the community?

Should the local government be able to tell someone they cannot rent their home?




Ideas for Regulation

- **Special residential zoning districts, i.e., require a rezoning?**
- **Require special use permits?**
- **Leave it as a matter of private declaration of covenants?**
- **Conditions of zoning?**




Short Term Rental

- **VRBO, AirBNB, Vacasa, et cetera**
- **Local governments can regulate, but defining short term rental is key.**
 - **May v Morgan County, 305 Ga. 305 (2019)**
- **Special Use Permit or Permissible only in certain zoning districts.**
- **Hotel Motel Taxes**



Rental vs. Extended Stay

- **Efficiency Lodge v. Neason, Ga. S.Ct. 2023**
 - Guest vs tenant- what's the difference? (Hint: eviction)
- **Regulation of extended stay:**
 - Zoning districts / special use permits
 - Standards
 - Life safety codes
 - Property maintenance
 - Kitchen and other housing requirements
 - Registry
 - Conversion of hotels to extended stay



Brown v. Carson, 313 Ga. 621 (2022)

Vested Rights

Vested Rights don't arise from a local government confirming what the ordinance says.