Keeping the Law on Your Side – Georgia Planning & Zoning Law Update

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APA GA
American Planning Association
Georgia Chapter
Making Great Communities Happen

"After all, a policeman must know the Constitution, then why not a planner?" San Diego Gas & Electric v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

Purpose of Session

- Provide Overview of Selected Recent Georgia Appellate Court Decisions Relating to Planning & Zoning
- Summarize and Comment on Recent U.S. Supreme Court Decisions Involving Signs, Takings Analysis, Telecommunications, and Raisins
- Try to Answer Your Questions in an *Educational* Setting
- Provide 1.5 Hours of AICP CM Legal Credit!

Recent Georgia Appellate Decisions

Overlay Districts

SDS Real Property Holdings v. City of Brookhaven (7/13/17)

- Developer appealed denial of LDP for mixed-use development on 3 parcels with C-1 and R-100 zoning within Brookhaven – Peachtree Overlay District, which allows for high-density, mixed-use development. Director based denial on finding that property needed to be rezoned. ZBA affirmed LDP denial.
- Construction of a zoning ordinance is a question of law for the courts
- Zoning ordinances must be strictly construed in favor of the property owner
- Code stated that overlay district provisions govern when conflicts existed between overlay district provisions and other regulations in the Code
- Developer exhausted administrative remedies by appealing LDP denial to BZA
- LDP for intended mixed-use project improperly denied

Standing to Challenge Zoning Decisions

Stuttering Foundation v. Glynn County (7/11/17)

- Tenant challenged rezoning of property obtained by Landlord to allow for expansion of existing building
- Court reiterated standing to challenge zoning decisions demonstrated through "substantial interest – aggrieved citizen" test
- Lease between Tenant and Landlord expressly created a *usufruct*, not an estate for years and, thus, did not convey an interest in the property sufficient to establish standing by Tenant


NOTICE
OFFICIAL PLAN & ZONING BY-LAW
AMENDMENTS CITY OF KINGSTON

Notice Requirements – Zoning Decisions

Hoeschstetter v. Pickens County (4/27/17)

- Plaintiffs argued BOC approval of CUP for special events on 75-acre property was invalid due to insufficient notice in violation of Zoning Procedures Law.
- County provided valid notice of PC hearing during 45 – 15 day window but no additional notice provided before BOC vote 3 months later
- Zoning Procedures Law requires hearing and notice of hearing prior to local government action resulting in a zoning decision
- Court held that notice not required at every stage of the process during the continuous course of a zoning matter
- Delay in final vote did not render sufficient notice of PC hearing invalid

Notice Requirements – Administrative Determinations

City of Dunwoody v. Discovery Practice Mgmt. (9/06/16)

- Director determined by letter in January 2014 that family personal care home was "permitted by right" in a single-family zoning district – no notice of decision provided to neighbors (not required by ordinance)
- Neighbors filed administrative appeal of decision in April 2014 with BZA, which (1) voted to accept appeal and (2) overturned staff decision as error
- Court stated that "zoning ordinances are to be strictly construed in favor of the property owner" and "never extended beyond their plain and explicit terms."
- Ordinance required appeal of administrative decision within 30 days and did not require notice of such administrative decisions, thus ZBA improperly heard appeal by impliedly reading notice provision into Zoning Ordinance

Injunction – Statutory Interpretation

Burton v. Glynn County (7/16/15)

- In response to neighbors' complaints, County ordered property owners to cease and desist use of their St. Simons Island property as event venue in a single-family (R-6) residential zoning district
- Owners filed suit against County seeking to stop County enforcement efforts – numerous appeals and cross-appeals filed following trial court rulings
- Court stated that when interpreting an ordinance "the cardinal rule is to ascertain and give effect to the intention of the lawmaking body."
- Court held that "frequency of events and . . . systematic [marketing] for large scale gatherings support the conclusion" that property was intended for use an an event venue – "beyond what that expected or customary for a one-family dwelling." Thus, use of *Villa de Suenos* as event venue not permitted.

Validity of Zoning Ordinance

Newton County v. East Ga. Land & Dev. Co. LLC (10/23/14)

- County enacted new Zoning Ordinance with references to zoning maps that were not adopted until two months later
- A zoning ordinance is incomplete and void from its inception if it incorporates by reference zoning maps that are an essential part of the ordinance yet those maps do not exist when the ordinance is enacted
- Principle of incorporation by reference cannot apply prospectively to a document that has yet to be filed or made a public record
- Subsequent adoption of maps did not revive the invalid ordinance

Vested Rights

Southern States-Bartow County, Inc. v. Riverwood Farms Homeowners Assoc. (3/17/17)

- Southern States requested letter of zoning compliance from Bartow County for landfill in 1990 – County denial led to litigation
- In separate 1991 *Tilley Properties* case, Court declared Bartow County Zoning Ordinance invalid as it was not enacted in compliance with the Zoning Procedures Law
- In 1993 Bartow County enacted new zoning ordinance with one-year sunset provision for vested rights acquired prior to adoption.
- In 1994 Superior Court ruled Southern States had acquired vested right for compliance letter without county restrictions – letter issued and continued for almost 20 years; EPD issued permit in 2013

Southern States - II

- Riverwood Farms filed lawsuit in 2013 alleging Southern States vested right to build landfill lapsed one year after new ordinance adopted
- Superior Court and Court of Appeals found no constitutional infirmity with provision addressing lapse of vested rights
- Georgia Supreme Court held that vesting provision affected “rights which accrued before it became operative”
- One-year requirement was “not a mere minimal condition to Southern States’ vested right – it acted to eliminate vested right irrespective of intent, financial outlay, and feasibility of use within that time frame.
- Provision was retrospective and, therefore, unconstitutional.

Form of Appeal
City of Cumming et al. v. Flowers et al. (3/6/17)

- Kerley Family Homes built townhomes within 20’ setback due to ‘surveyor error’ (variance from 20’ to 5’ and 15’).
- City approved variances and Castleberry neighbors filed an appeal in superior court.
- Under then-prevailing case law, zoning ordinance governed method of appeal (mandamus if ordinance was silent).
- Neighbors appealed by mandamus because Cumming zoning ordinance did not prescribe method of appeal.

Form of Appeal - II
City of Cumming et al. v. Flowers et al. (3/6/17)

- City filed motion to dismiss based on OCGA sect. 5-4-1 (Requires quasi-judicial appeals for appeals from inferior judicatory)
- Superior Court denied motion to dismiss and case went to Georgia Supreme Court for interlocutory review.
- Supreme Court overturned Superior Court denial and decades of previously settled case law.
- Supreme Court held that appeals of quasi-judicial decisions (such as a variance) may be challenged *only* by a petition for certiorari

Annexation – Notice Requirements

City of Lovejoy v. Clayton County (4/13/2016)

- City received annexation application from owner of 10.177 acre tract
- Original notice to County did not include adjacent parcels, simply reference 11143 Tara Boulevard and included application
- Mayor later sent information indicating 5 additional acres included
- Published notice only referenced 11143 Tara Boulevard – no mention of adjacent parcels
- Council held hearing and voted to annex “Publix Shopping Center” – ordinance only referenced original 10.177 acre tract, 6 months later added additional parcels
- Court held annexation void because adjacent landowners never provided adequate notice before hearing as required under State annexation statute

Notable Recent U. S. Supreme Court Decisions

Recent Regulatory Takings Case

- Murr v. Wisconsin, decided June 23, 2017
- Involved adjacent substandard lots (E and F) under common ownership adjacent to St. Croix River/Lake St. Croix
- Family vacation cabin located on Lot F
- State & local regulations prevented separate use or sale of adjacent lots under common ownership unless they had at least one acre suitable for development – “effectively merged” lots E and F
- Owners wanted to move cabin on Lot F and sell Lot E; sought, but were denied, variances from County Board of Adjustment
- Owners filed suit alleging regulatory taking of Lot E and sought compensation

Murr v. Wisconsin - II

- Court considered whether lots E and F should be considered individually or as a single parcel for the purpose of deciding whether the prohibition agains separate sale and development resulted in a taking.
- Court determined the ***combined*** parcel was the relevant unit for purposes of the takings analysis and that no taking occured
- Court set out a "number of factors" to determine relevant parcel:
  - the treatment of the land under state law
  - the physical characteristics of the property
  - the value of the property under the challenged regulations

Recent Physical Takings Case

- Horne v. Dep't of Agriculture, 192 L.Ed. 2d 388 (2015)
- Physical takings case
- Takings clause applies equally to the physical appropriation of private property as to real property.
- "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."

Marvin & Laura Horne

Recent Sign Case

- Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015).
- A sign regulation "is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed."
- Ordinances with different rules for signs based on topic, content, or subject matter are "content-based" regulations subject to "strict scrutiny," which means regulations must be "narrowly tailored" to address a "compelling government interest."

Gilbert, Arizona Sign Ordinance

DURATION

Display Time Before	Sign Content	Display Time After
Unlimited	Ideological	Unlimited
4 ½ Months	Election	15 Days
30 Days	HOA Event	48 hrs
16 hrs	Real Estate Sale	36 hrs
12 hrs	Religious Event	1 hr


Good News
Presbyterian
GILBERT ELEMENTARY
www.goodnewspres.com
9:00 AM

Recent Telecommunications Case

- T-Mobile South, LLC v. City of Roswell, Georgia, 135 S. Ct. 808 (2015).
- Tower application denied. Applicant informed of denial by letter, which indicated reasons for denial would be in City Council Minutes. Minutes (with reasons for denial) published only four days before end of 30-day appeal period.
- Federal Telecommunications Act of 1996 requires localities to provide written notice of denial and written reasons for denial of applications to build cell towers in order to provide for judicial review of such decisions.
- Reasons need not be in the denial notice itself but, if not, must be stated with clarity in some other written record "issued essentially contemporaneously" with notice of denial.

Your Questions

Thanks!

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