

Georgia Planning Association
817 West Peachtree Street, NW
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GEORGIA PLANNER

Newsletter of the Georgia Planning Association,
A Chapter of the American Planning Association

Image of the Chattahoochee River

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GEORGIA PLANNER – September 2006 Newsletter of the Georgia Planning Association, A Chapter of the American Planning Association



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Sustainability and Property Rights

by Edward T. McMahon

[First published in ULI's Urban Land]

“Don’t take away my property rights” has become the standard refrain wherever local government proposes land use regulations of any kind. In November 2004, for example, Oregon voters passed Measure 37 requiring cities, counties, and the state of Oregon to waive land use restrictions and safeguards or to pay owners to obey the law. Emboldened by the Oregon initiative, property rights advocates in many other states are now proposing similar measures.

Collectively known as “takings” legislation, these measures would require government to pay landowners for any diminishment of value brought about by land use regulations. If government cannot afford to pay, it will have to waive or forgo the regulation.

Property rights advocacy is rooted in the Fifth Amendment to the U.S. Constitution, which states that private property shall not be taken for public use without just compensation. The language of the takings clause is pretty straightforward. In general, the only instance in which government must pay a property owner is when private land is physically seized or “taken” for public purposes such as building new roads or other public facilities. In addition, there is an established body of law that protects landowners from overly burdensome regulation. Generally, the courts have limited compensation to those exceptional cases where a regulation has the effect of denying a landowner all or nearly all beneficial use of his or her property.

In recent years, however, some antigovernment activists have advocated for an extreme view of property rights that would require government to pay landowners anytime regulation limits the use of private property.

These so-called takings measures are unfair, unwise, and based on a fundamentally flawed assumption—namely, that land use regulations, per se, reduce property values. On the contrary, sensible land use regulations almost always increase property values.

Take zoning, for example. Zoning is the basic means of land use control employed by local governments in the United States. It has been around since 1916, the year when New York

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EDITOR'S NOTE

by Bill Ross

The next “big issue” sweeping the Nation and Georgia targets Inverse Condemnation, or “regulatory takings.” Sen. Eric Johnson, President Pro Tem of the Georgia Senate, spoke recently to the Ga. Public Policy Foundation. On the subject of government reform, he said, “We must continue to debate a solution to inverse condemnation. Government must be restricted in its ability to ‘take’ land without compensating the owner.” Emboldened by the recent limitations placed on local governments’ eminent domain powers, his views are shared by many of his fellow legislators. A move to amend the Ga. Constitution has already been introduced (SR 1040). Expecting hot debate this session, GPA has devoted this entire newsletter to this critically important matter, which threatens every restriction on land use from zoning to clean water.

[To read all of Sen. Johnson’s agenda, go to www.gppf.org/article.asp?RT=&p=pub/General/Johnson-speech060601.htm. For a copy of SR 1040, go to www.legis.state.ga.us/legis/2005_06/sum/sr1040.htm.] ■

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Remember 2006!

We are headed into the final months of 2006. Remember this as the year we were on top of the world in Georgia planning. It has been 10 years since the Olympics were held in Atlanta.

The 28 county Atlanta MSA has led housing starts nationally for 12 years in a row. Smart Growth has been our vocabulary for at least that long. Many local governments and the private sector are building great communities often with neighborhood support. We have alot and we know alot.

Unfortunately, there are some individuals that think a better state model for private investments exist.

They compare Georgia to Oregon and say like Oregon we restrict property too much. I call this comparing apples and space rocks. These are the same persons that think if a car runs well on 8 cylinders, you should add 4 more.

As Chris Leinberger, a national real estate analyst said, ‘Atlanta grew faster in the 1990s than any human settlement in history’. Sound like a restrictive state to you? And we are going to grow alot more. But some think we are restricting developers and raising housing prices with pesky zoning. Forget that Georgia is one of the most affordable places to live or that basically all you need is an acre of land in most places to build a home.

Our state is about to head into another legislative session with another shot at rolling back local property controls to pre-industrial standards. Our balanced system for property regulations may be on the way out, the inverse condemnation radicals are coming! They think local governments are bad and keep them from certain riches if appraisers could just make all the zoning decisions instead of elected officials. There is no better system for balanced development in the U.S. Wake up. We have a great state. Tell your planning commissioners and elected officials to tell state legislators that inverse condemnation and radically changing our system of local control is a fools game.

Dues News

The GPA Board has voted to change the rate for a chapter membership to be \$35 annually for APA members. The rate was already \$35 for a “chapter only” membership which created some confusion. We expect to provide additional services to members from revenue generated by this change including the possibility of part-time administrative staffing for the organization. Please look for e-mail and newsletter article in the coming months on this issue.

Dan Reuter, AICP

President

CHANGE OF ADDRESS

The Georgia Chapter does not maintain address lists. All lists are maintained at the national office and are mailed to the local chapters each month. If you have moved, e-mail: addresschange@planning.org, go to Member Login at www.planning.org, or write to:

American Planning Association
97774 Eagle Way
Chicago, IL 60678-9770

MEMBERSHIP INFORMATION

If you are interested in joining GPA or the American Planning Association, contact the national headquarters at the address above or call (312) 431-9100 or visit their website at www.planning.org.

CONTACTS

Direct financial inquiries and address payments to the Treasurer. Direct questions about chapter records to the Secretary. Direct matters for the Board of Directors to the President. See mailing and email addresses inside.

SUBMISSION

The Georgia Planning Association welcomes articles, letters to the editor, photos of planning events or state happenings, calendar listings, job notices, planners on the move, etc. We are always interested in publishing items you think may be of interest to others throughout the state. Graphics are especially welcome. Articles may be edited for space. Articles printed in any issue of The Georgia Planner are not the expressed opinion of the Chapter.

DEADLINE

The deadline for the next issue is **November 31, 2006**.

Send items for the newsletter to:

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CALENDAR OF EVENTS - visit the website for the current events listing

October 10th	IAP2 Georgia Chapter – Brown Bag Lunch Talks	Atlanta, GA	sallison@jgg.com
October 11th – 13th	GPA Fall Conference	St. Simons, GA	www.georgiaplanning.org
October 19th-20th	First Annual Upper Altamaha Stakeholder Conference, UGA	Athens, GA	www.rivercenter.uga.edu
October 19th – 21st	Place Matters 2006: A Creative Planning Collaborative for Sustainable Communities	Denver, CO	
October 31st – Nov. 5th	Making Preservation Work: National Preservation Conference	Pittsburgh, PA	www.nthpconference.org
November 3rd	Sustainable Atlanta Roundtable	Atlanta, GA	www.southface.org
November 4th – 8th	Railvolution 2006	Chicago, IL	www.planning.org
November 13th – 15th	Brownsfields 2006	Boston, MA	www.planning.org
November 15th – 17th	Georgia Urban Forest Council’s 16th Annual Conference		www.gufc.org
November 30th	Quarterly Newsletter Deadline		rossatcr@cs.com
December 8th	GPA Board Meeting	TBA	dunnivant@cityofnewnan.org

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Inverse Condemnation

by Dan Reuter, AICP,

In recent years, a concept known as “inverse condemnation” or “regulatory takings” has been shopped around state legislatures by various groups including some real estate investors, brokers, developers and self-proclaimed property rights advocates. Proponents have a libertarian view of local government property regulations in that ownership of property should provide legal rights but few, if no, legal restrictions.

The inverse condemnation theory is based in the argument that local governments should reimburse a property owner for any perceived “devaluation” that has occurred from regulatory actions, including such things as land use restrictions, environmental regulations, zoning or a rezoning denial as determined by an appraisal. If such compensation cannot be paid, the regulation should be removed (a variance granted) or allowance of a greater use permitted. Inverse condemnation also follows the belief that greater value and financial gains can be achieved for developers and investors if local zoning and other regulations went away.

Our system of property regulation has evolved over hundreds of years from European systems to the United States and through an evolution of law in Georgia. These laws have evolved in developed countries like the United States because bankers, property owners and communities sought legal structure and certainty for real estate and investments. Zoning began in the 1920s as a result of health conditions in U.S. cities. It was necessary to separate obnoxious and unhealthy uses (i.e. large meat processing operations) from residential uses. Eliminating local zoning and other regulations through inverse condemnation will create the potential for unhealthy and unsafe communities.

Georgia attracts corporate and other private investment, in part, because banks, investors and homeowners have a reasonable degree of certainty and balance in their rights to own, use and sell property. This certainty is based in large degree on local government regulations including the confidence that adjoining property to an investment will not unreasonably be permitted an adverse or incompatible use such as a salvage yard, waste transfer station or large apartment complex. Most home buyers consider the quality of the existing neighborhood and the potential for a nuisance adjoining their home when they purchase it. Collectively government property regulations create and sustain value by limiting the extremes uses and uncertainty.

Returning Georgia to the legal standards of property use that existed in pre-industrial times would create skewed results. Some persons by a home in a subdivision with private covenants for the same reason some individuals are reluctant to build a home in a county without zoning. If the potential exists for an adjoining property owner to conduct any activity that has an adverse influence on values, a large investment in constructing a home is too risky for some homeowners.

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thank you to our sponsors!

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City enacted the nation's first comprehensive zoning ordinance to protect the health, safety, and welfare of residents packed into crowded urban tenements. By some estimates, more than 9,000 cities, towns, and counties, both big and small, in every region of the country, and representing at least 90 percent of the nation's population, have some form of zoning in place.

Does this mean that every land use decision made by a local planning commission is a good one, or that zoning has produced nothing but the high-quality living and working environments we all care about? No, zoning has not always lived up to its promise and it is sometimes misused. For example, in some places, zoning is used to exclude low-income families or to keep out minorities. In other places, zoning is used to give landowners and builders exactly what they want, regardless of the cost to the community or the impact on adjacent landowners. Want to build a shopping center in a floodplain or a racetrack next to a residential area? No problem, we'll just rezone the property.

Zoning is merely a tool. It can be used constructively as a positive force for community good or it can be misused. Zoning is whatever one makes of it. It works best when it is based on a vision and closely tied to a comprehensive plan. At its best, zoning can provide landowners and the marketplace with predictability and certainty. It can protect critical resources and increase property values.

So why do some people think zoning is a dirty word? Why do they get so upset whenever zoning is proposed in a previously unzoned municipality or whenever a community wants to strengthen its land use rules and regulations?

The two most common objections to land use regulation are, first, a perceived loss of control. Zoning opponents say, "If you own a piece of land, you should be able to do what you want with it." Second, there is a pervasive fear that regulation of any kind will reduce property values.

Land use regulation is as American as baseball or apple pie, but a county commissioner from a western North Carolina county once told me how he was called a communist at a public hearing on a proposed zoning ordinance. He replied that while he was a Methodist, he certainly was no communist.

Land use disputes often inspire inflated rhetoric. Perhaps this is because land use regulations do mean that the interests of individual property owners must sometimes yield to the interests of the public. But isn't this just part of democracy? In fact, for more than 150 years, the courts have consistently held that the U.S. Constitution allows for the public regulation of private land.

To understand this, consider the old principle of law that says "your right to swing your fist ends where my nose begins." This principle applies to real estate as well. It means that with rights come responsibilities. Even political philosopher John Locke held as a basic assumption that "free men would never exercise their rights without recognizing the obligations that the exercise of those rights implied."

So what about fear of loss of control? It is true that some places grow much faster than others, but change is inevitable everywhere in America. Technology, immigration, new roads, the global economy, and many other factors are changing communities, particularly rural communities, whether they are prepared for it or not.

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Uncertain Future for Takings, Eminent Domain Bills SEN. INHOFE TRIES TO REVIVE EMINENT DOMAIN BILL IN SENATE

With only a handful of voting days remaining before Congress adjourns for the final sprint to Election Day, the future of many pending bills remains in doubt. Leaders in both the House and Senate have indicated that the remaining agenda will be dominated by security and spending legislation.

Eminent domain and takings bills are among those facing an uncertain fate. In the House, an eminent domain bill, H.R. 4128, was passed late last year, but no companion bill has yet moved in the Senate. The House Judiciary Committee approved a sweeping takings bill, H.R. 4772, this summer. A floor vote appeared likely prior to the August recess but action was delayed. Although House leaders have indicated support for the takings measure, no floor time has yet been scheduled.

In the Senate, the Judiciary Committee has been discussing a property rights bill for months but despite the work no bill has yet emerged. Late last week, Sen. James Inhofe (R-Okla.) took the unusual step of introducing an identical version of the House eminent domain bill using a procedure that allows the bill to bypass committee consideration. However, the bill is subject to unanimous consent.

Property rights groups are making a final lobbying push to get action before the end of the 109th Congress, but the bills may end up caught in the legislative logjam. A broad coalition of organizations, including APA, has strongly opposed both the eminent domain and takings legislation. A previously approved one-year ban on the use of eminent domain in certain projects receiving federal aid appears likely to be renewed.

For more information, visit APA's web site: www.planning.org

WEB RESOURCES

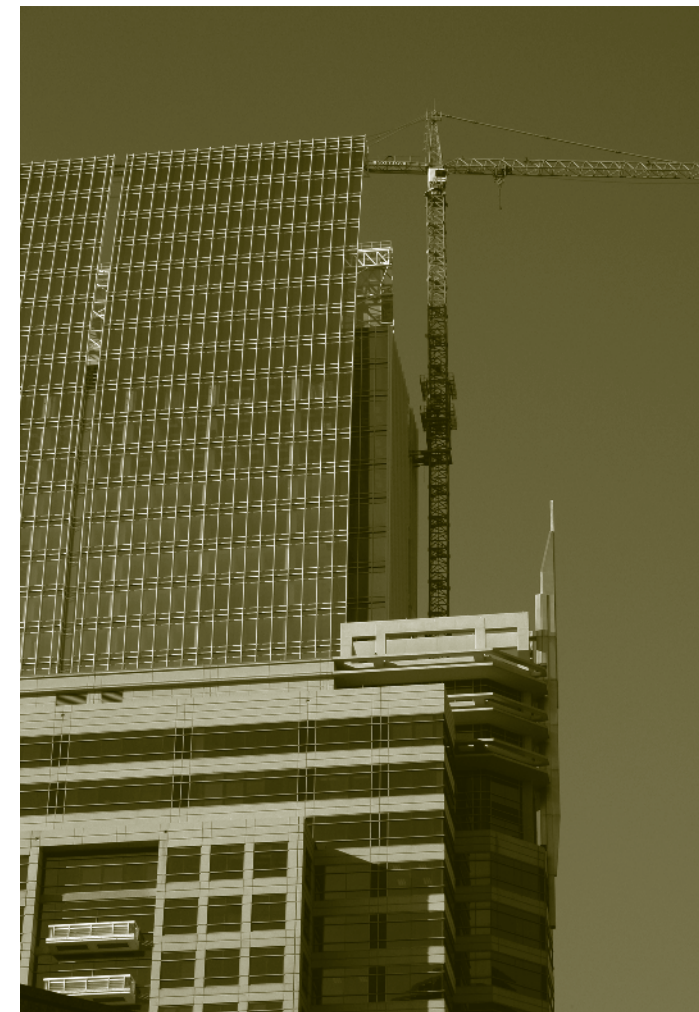
Resources abound! Google "inverse condemnation" and you'll get about 422,000 hits!

For the less adventuresome, check these out:

There's an insightful article from NPR – *Western Voters Weigh Shift in Property Rights*
www.npr.org/templates/story/story.php?storyId=6085168

Explore APA's web site – www.planning.org – for current news and reports. The latest edition of APA's Planning and Environmental Law has an in-depth article, "Regulatory Takings Initiatives at the Fall 2006 Ballot Box."

You can download the latest version of SR 1040 at www.legis.state.ga.us/legis/2005_06/sum/sr1040.htm, and on the GPA web site – www.georgiaplanning.org – you can download ACCG's Talking Points on SR 1040.



NEWS FLASH!

Congratulations to these eight GPA members (now AICPs) who passed the AICP Exam in May, 2006.

Ellen Pratt Byrdsell
Alyssa S. Durden
Geneasa Lynette Elias
Courtland Hyser
Julie Kovach
Courtney M. Power
Patrice S. Ruffin
Kristen Wescott

This was a 50% pass rate. The national average was 67%.

There are 39 potential AICP Exam candidates for the November 2006 test. This is a bumper crop!

Let's give them the support and encouragement they need!

Gary Cornell, AICP
PDO

- Resulting deregulation of property will cause unintended economic, legal, environmental and social consequences.
- Such a change will benefit only a few owners and developers yet create more property value risk for all homeowners and businesses
- Law would open a floodgate of litigation for local governments that could require higher local taxes to defend.
- Inverse condemnation would disrupt the Georgia economy, by robbing resources from legitimate planning and development activities.

Why Inverse Condemnation is Wrong for Georgia

- Zoning was created to protect citizens from unhealthy and unsafe conditions.
- Property regulations create a stable environment for investments and protect values. Most investors and homeowners want the security of knowing their property investment will not be impacted or devalued by an adverse use or public nuisance.
- In March 2006, Randal O’Toole, author of a report on the “Planning Penalty” stated that Atlanta is a model region with few regulations that increase the cost of homes.
- Georgia has over 9 million residents and more than 80% of the population lives in cities or adjoining suburban counties.
- A majority of the revenue that funds major public infrastructure, like widening of state highways, is generated from taxes paid by residents in cities and adjoining suburban counties.
- Publicly funded infrastructure (roads, water, sewer, fire services) provides access and services to property which increases value.
- Comparing Georgia regulatory issues with any west coast U.S. state or Florida is absurd. Georgia is much less restrictive on the use and development of property.

What Should Occur

- State and local governments should address the needs of individuals who have real regulatory burdens and issues.
- Property regulations require a balance of property restrictions with the benefits to the public for protection of health, safety and welfare
- Regulatory issues involve individual properties with specific conditions. Many of these issues require specific solutions that are difficult to address in state law.
- Educate elected officials and citizens on existing takings laws.
- Recognize that reasonable regulations provide the basis for a strong real estate market.
- Focus on win/win tools and solutions that link public and private interests. ■

There really are only two kinds of change in the world today: managed change and unmanaged change. Land use planning is one way to mitigate and manage change. Communities that want to preserve what makes them special have no real choice except to plan for the future. This requires sensible rules that govern how a community will grow and change. The rural landowners who most abhor change are often the first to realize that without sensible land use controls, everything they love about the place they live will ultimately disappear.

As for property values, hundreds of decisions are made every day by public bodies that affect someone’s property values; however, these decisions are just as likely to increase the value of property as to diminish it.

As mentioned earlier, sensible land use controls almost always enhance rather than diminish property values. If you don’t believe this, visit any historic district and compare property values in the district with property values outside of it. On the other hand, try selling a home next to an asphalt plant, a billboard, a landfill, or other noxious use. Real estate appraiser Don Rypkema says, “Sensible land use controls are central to economic competitiveness in the 21st century.”

The argument that any limitation on the use of land reduces property values simply doesn’t hold water. Whether it is historic district zoning, height restrictions, corridor overlays, or setback requirements to protect rivers and streams, the evidence suggests otherwise.

The 2002 PriceWaterhouseCoopers Emerging Trends in Real Estate report put it this way: “Properties in better-planned, growth-constrained markets hold value better in down markets and appreciate more in upcycles. Areas with sensible zoning [integrating commercial, retail, and residential], and parks and street grids with sidewalks will age better than places oriented to cul-de-sac subdivisions and shopping centers navigable only by car.” The real estate analysts at PricewaterhouseCoopers went on to say, “Markets where you can build too easily tend to produce lower returns.”

Even downzoning may not cause a decrease in land value. For example, a 2002 study conducted by the University of Maryland’s Center for Agro-Ecology found that “reducing the number of homes that can be built per acre on a section of land does not necessarily reduce the value of the land and may increase it.”

In fact, the value of land on which very restrictive agricultural zoning had been imposed increased in value or experienced little or no change in four Maryland counties analyzed in the study. Likewise, a review of previous land use studies done in other states found that “downzoning done in conjunction with a comprehensive land use plan stabilized land values, and protected farm and forest land from sprawl for long periods of time.”

Now, I am not arguing that land use regulations never lower property values or that every land use regulation makes sense. Rather, I am questioning the popular perception that limits on the use of land automatically result in a loss of value.

The truth is, the primary source of value in real estate is largely external to the lot lines. If you don’t believe that, remember the traditional real estate mantra: location, location, location.

A 1994 study conducted by the National Association of Home Builders in Washington, D.C., found that “a mountain vista or proximity to a park, water, or green space affects the value of a home more than the size of the home, the number of rooms, the type of appliances, or the presence of a swimming pool.” In other words, the surrounding environment (i.e., its context) is the single most important factor affecting the market value of a home. Virtually all land use ordinances are about protecting that context or surrounding environment, whether they are zoning ordinances, historic districts, or laws to safeguard streams or views.

Numerous social, political, economic, and physical factors affect the value of real estate, but the primary reason why land use controls were created in the first place was to protect property values, not undermine them. For example, suppose a landowner proposes building a strip club or a casino on his or her property. Nearby property owners often will object, arguing that these land uses will adversely affect their property values.

Perhaps the most important reason why land use regulation has flourished, despite its imperfections, is that it gives citizens a voice in local government. Without zoning or other land use controls, citizens would have no voice when out-of-town corporations run roughshod over local values and traditions. It also makes land use decisions public. This is important because the more a community understands how decisions are made, the better future decisions will be. Today, this principle is under assault by “undesirable users,” such as industrial hog or poultry operations and billboard companies. Lobbyists for these industries work to get state legislators to pass laws that take away the ability of local authorities to regulate them, knowing that local officials are unlikely to approve of their use of the land.

Sustainability is really about balance. At their best, land use regulations can help strike the elusive balance between quality of life and economic vitality. Without sensible land use regulations, we would have chaos not only on the landscape but also in the marketplace. Efforts to gut land use controls through so-called takings legislation are unfair, unwise, and based on a fundamentally false premise. These efforts would, in the long run, be very harmful for both communities and the real estate industry. ■

Local governments in Georgia administer laws and regulations at a community and neighborhood level. Local government officials support, balance and protect property rights of citizens on a daily basis. Advocates of inverse condemnation seek to define property rights as all rights without any community responsibilities. Ownership of land creates legal responsibilities in some aspects in the same manner as ownership of an automobile. Governments do not pay individuals to obey traffic laws. Nor should local governments pay an individual to uphold standards that protect the health, safety and welfare of a community.

Protecting property rights is an important and paramount responsibility of local government. Local governments seek to create regulations for valid purposes pursuant to existing legal restrictions provided by the Georgia and U.S. Supreme Courts. The vast majority of citizens and property owners are satisfied with the actions of local governments to protect their property. Changing zoning and property laws in a radical manner through inverse condemnation will permit developers and real estate investors to use land in an unreasonable manner and ultimately will require a larger tax burden to correct. Inverse condemnation proponents may argue that eliminating all zoning is not the goal versus the protection of “down-zoning”. Unlawful down zoning of property is already illegal in Georgia and rarely occurs.

If inverse condemnation legislation were passed, local governments would be forced to fight new zoning lawsuits for many types of “takings” claims and with the inability to pay unprecedented compensation, zoning requirements would be removed. The floodgate of litigation will not only disrupt community planning and legitimate property development but cost tax payer’s substantial funds to defend basic health, safety and public welfare interests.

Inverse condemnation would create radical changes for management of growth, control of “nuisances” and protection of the environment in Georgia. Georgia has a history of balanced state and local planning through the 1989 Georgia Planning Act and other state laws. Not only would inverse condemnation reverse years of community planning it would also threaten water and other environmental protections.

Protection of water quality is increasingly important to Georgia’s economic development. Georgia’s economy and future jobs will be threatened if availability of clean water is not assured. Georgia is required under federal law to protect water quality. In addition, most Georgians desire and expect reasonable management of property, particularly adjoining streams and rivers, where Georgians receive drinking water.

Compared to the vast majority of U.S. states, Georgia is a relatively less regulated and easier state to develop private property. In March 2006, the Georgia Public Policy Foundation republished an article by Randal O’Toole, titled “The Hidden Cost of Planning”. While the article bemoaned the abuses of urban growth boundaries and other growth management tools, the report also found that no such hidden cost of planning was present in Georgia. The facts are that Georgia is a balanced state where substantial construction and development occurs.

Development and property investments based on our existing balanced regulatory framework are a large contributor to the Georgia economy. If local governments are spending already limited time and resources defending and processing inverse condemnation claims, they will not be spending those same resources conducting the planning, zoning, subdivisions and infrastructure activities that support the majority of Georgians and private development that is occurring.

Everyone in real estate, private development or public planning has a story of poorly administered property regulation. However, Georgia also has many more good examples of state and local government regulations or practices that work with property owners and developers to achieve investment goals while balancing the need for regulations. We should rely on these good practices of producing win/win partnerships with property owners and developers versus radical changes that could disrupt our economy, create a new tax burden and risk homeowner’s quality of life for the benefit of a few property owners and developers.

Out of control development and unfettered uses of property for unsafe, unhealthy and immoral uses is bad for everyone. While zoning restricts some development and uses, it balances and protects the existing values and quality of life for the vast majority of Georgia citizens. ■

georgia planning association INVERSE CONDEMNATION POSITION

Background

- Inverse condemnation is a concept that any government regulation should compensate property owners based on the perceived impact on appraised value
- Diminishes legal responsibilities of property ownership to neighbors or community
- U.S. system of property regulation has evolved over 80+ years with local government regulations and Supreme Court decisions changing to meet the needs of owners and communities
- Georgia system of regulatory Home Rule is strongly supported and defended by local governments and citizens
- Georgia’s system of regulation and private development is generally balanced. From a private investment point of view there is no more advantageous property regulatory model in the U.S. Evidence of this fact can be seen in the growth of the state.

Growth in Georgia

- The 33-county Atlanta statistical area or over 1/5 of Georgia counties led the nation in 2005 with 72,861 new building permits. The Atlanta MSA has led the U.S. for 12 years in a row for new residential construction.
- Georgia will receive substantially more growth during the next 25+ years from existing birth rates, new retirees and migrants from other U.S. states, etc. Georgia is not in a position of needing to undertake aggressive regulatory changes to ensure our economy will grow.
- The Atlanta MSA is the most regulated development area in the state yet compared to other U.S. states Georgia has much fewer regulations that control development. Many counties have no zoning at all.
- During the 1990’s north Georgia was considered the “king of sprawl” and suggested to have grown “faster than any human settlement in history”. These phrases seem to conflict with the idea that Georgia is restrictive on the use of property.

Problems with Inverse Condemnation

- Legislation that seeks to define a “taking” as devaluation of property will cause major problems for Georgia governments.
- Roughly 5,000 rezoning decisions that occur each year in Georgia could be challenged on this basis.