

How to Fix Georgia's Planning & Zoning Enabling History

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History of Zoning in Georgia – Karen Shelley

In 1927, the U.S. Supreme Court held that zoning laws enacted by a state's General Assembly were a valid exercise of the state's police power and that zoning laws were not a violation of the 14th Amendment's due process clause. ¹ In response to this decision, the Georgia General Assembly proposed a constitutional amendment which authorized zoning in a few specifically authorized cities. ²

The Georgia Supreme Court did not align with the federal Court on this issue, but obviously had to comply. Therefore, the Court issued an opinion which is the basis of a unique Georgia doctrine. The opinion states that the zoning power is not an inherent police power of the State (as held by the U.S. Supreme Court), but that the power to zone should come only from an expressed Georgia Constitutional grant. This doctrine remains in force to this day. ³ The legal consequence of this opinion is that in the state of Georgia no general zoning power can exist in any governmental body beyond that which is expressly provided in the Constitution.

One can only assume that the Georgia Supreme Court inherently disagreed with the United States Supreme Court's holding in Euclid and felt that the government should not be able to interfere with a private property owner's rights to use his property as he sees fit. Therefore, to comply with Euclid while advancing their own interests in reserving rights to the people, the Georgia Supreme Court required that the power to zone property should come from the Constitution, rather than the legislature.

Various Constitutional amendments were quickly proposed by the legislature and ratified by the citizens of Georgia. In 1937 the voters amended the Constitution and granted the power

¹ Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

² Ga. Const. of 1877, art. III. §7, ¶25 (1927).

³ Commissioners of Glynn County v. Cate, 183 Ga. 111 (1936).

to zone to “any city or county having a population of 1000 or more”.⁴ In 1945, the revision of the state Constitution eliminated the specific listing of local governments by name and granted cities and counties general authority to zone.⁵

In most states, local governments only possess powers which the state legislature has granted to them. Local governments possess no inherent right of self government.⁶ Although legislatures are reluctant to grant local governments too much power, it only makes sense that they must; otherwise they would be inundated with daily administrative functions of local governments which would flood the legislature with babysitting activity. The 1945 Constitutional amendment which granted home rule powers read as follows:

The General Assembly shall provide for uniform systems of county and municipal government, and provide for the optional plans of both and shall provide for systems of initiative, referendum and recall in some of the plans for both county and municipal governments. The General Assembly shall provide a method by which a county or municipality may select one of the uniform systems or plans or reject any or all proposed systems or plans.⁷

The Supreme Court interpreted this Constitutional provision to mean that the General Assembly was authorized to enact general, standard model enactments in regard to zoning. On this premise, the legislature enacted the 1957 Zoning Enabling Act which was codified at Chapter 69-8 and Chapter 69-12 of the Georgia Code Annotated.⁸ This act also proscribed a uniform system for zoning, and contained provisions by which citizens could appeal a municipality or county zoning decision.⁹ The 1957 act was a valid exercise of the legislative

⁴ 1937 Ga. Laws 1135, amending Ga. Const. of 1877, art. III §7, ¶26.

⁵ DeSantis, Linda K, Constitutional Barriers to Statewide Land Use Regulation in Georgia: Do They Still Exist? 3 Ga. St. L. Rev. 249 (1986). See also Ga. Const. of 1945, art. III, §7, ¶23.

⁶ Howard, Home Rule in Georgia: An Analysis of State and Local Power, 9 Ga. L. Rev. 757 (1975).

⁷ DiSantis, 259 citing Ga Const. of 1945, art. XV, §1, ¶1.

⁸ Adams, “Out of the Midst of the Fire”: Vignettes from the Code of 1981, 19 Ga. St. B. J. 130, 133 (1983).

⁹ Id.

power to provide for uniformity in the cities' and counties' utilization of their planning and zoning authority.¹⁰

Further amendments were made to the Constitution, the most important of which was the 1966 County Home Rule provision. Paragraph 3 of the Home Rule amendment provided as follows:

‘The governing authority of each county is empowered to enact for unincorporated areas of the county appropriate planning and zoning ordinances for public safety, historic, health, business, residential, and recreational purposes. Such governing authority is hereby authorized to establish planning and zoning commissions separately or in conjunction with any combination of other counties and municipalities of this State and adjoining States. The General Assembly is hereby authorized to provide by law for such joint planning and zoning commissions and provide the powers and duties thereof. Such governing authority is hereby authorized to participate in the costs of such planning commission.’¹¹

The amendment granted power directly to the governing body of each county to enact zoning and planning ordinances, while allowing the General Assembly to establish and regulate joint planning and zoning commissions. The Supreme Court interpreted the 1966 County Home Rule Provision to mean that the amendment had stripped the General Assembly of its power to regulate in the area of zoning and planning.¹² This was a striking decision, because even though earlier Supreme Court cases held that an express grant of power was needed, via the Constitution, to exercise zoning power and only local governments had that power, no case had ever held that the General Assembly lacked the power to regulate in the area of zoning and planning. In Johnston, however, the Supreme Court held that the 1966 County Home Rule

¹⁰ Bolton, Arthur K., Attorney General of Georgia, Official Opinion No. 77-5, 1977 Op. Atty. Gen. Ga. 7.

¹¹ Johnston v. Hicks, 225 Ga. 576, 579 (1969).

¹² Id. at 581.

Amendment had stripped the General Assembly of its power to regulate in zoning and planning.

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Following the Court's decision in Johnston, the General Assembly passed a Constitutional amendment known as Amendment 19.¹⁴ This amendment reinforced the self-executing planning and zoning powers of counties and granted corresponding authority to municipalities.¹⁵ It also authorized local governments to exercise powers and provide services in fifteen different areas such as police, parks, public facilities and other areas, including planning and zoning. The amendment declared that, except in the area of planning and zoning, the General Assembly could work concurrently with local governments in "regulating, restricting or limiting the exercise of such powers".¹⁶ This amendment reinforced the home rule doctrine and the abrogation of the General Assembly's power to plan and zone. The language of Amendment 19 was included in the new Constitution of 1976.¹⁷

In interpreting the language of the new 1976 Constitution, the Attorney General wrote:

"Thus, the new provision of the new Constitution prohibits the legislature's enactment of any further legislation concerning planning and zoning. Furthermore, the 1976 Constitution apparently invalidates the 1957 Zoning Enabling Act since these acts clearly regulate the zoning and planning power of cities and counties by establishing uniform procedural mechanisms for the implementation of that power."¹⁸

It would seem that the 1976 Constitution rang the death knell for the General Assembly to regulate zoning or land use in Georgia. In fact, when the legislature amended the Official Georgia Code in 1981, the 1957 Zoning Enabling Act was not included in the revisions, leaving

¹³ DiSantis at 260.

¹⁴ Id.

¹⁵ Bolton, Arthur K., Attorney General of Georgia, Official Opinion No. 77-5, 1977 Op. Atty. Gen. Ga. 7

¹⁶ DiSantis at 262

¹⁷ Id.

¹⁸ Op. Atty. Gen. Ga. 7

the municipalities and counties to their own devices.¹⁹ The justification for this omission can only be by virtue of the new Constitutional provision which effectively repealed the 1957 act. A city or county could now establish whatever system it desired for the implementation of its zoning and planning powers, as long as that system was not arbitrary and without a rational basis.²⁰

However, a glimmer of hope remained in the adoption of a “vital areas” section of the 1976 Constitution. This provision stated:

“The General Assembly shall have the authority to provide restrictions upon land use in order to protect and preserve the natural resources, environment and vital areas of the State”²¹

This “vital areas” language has been judicially interpreted to mean that in the area of environmental legislation, the Constitution specifically authorizes the General Assembly to provide restrictions upon land use in order to protect and preserve the natural resources, environment and vital areas of the state. Any legislation in this area is a valid exercise of the State’s inherent police power. This vital areas language could form a permissible basis for future legislation regulating planning and growth management laws.²² This premise is discussed further *infra*.

In 1983, the Constitution was again revised. The rallying cry of the Select Committee on Constitutional Revision of 1983 was "brevity, clarity, flexibility." The final product reflected this goal. The document as ratified was about half as long as the 1976 Constitution; it was better organized and wherever possible used simple modern English in place of arcane and

¹⁹ Adams, *supra*.

²⁰ See Olley Valley Estates, Inc. v. Fussell, 232 Ga. 779 (1974).

²¹ Ga. Const. of 1976, art. III §8, ¶7

²² Pope v. City of Atlanta, 242 Ga. 331 (1978).

cumbersome terminology.²³ The shorter, simpler Constitution now addresses zoning in only forty one words:

“The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power”.²⁴

Although the zoning and planning laws in Georgia have suffered a long and troubled history, the significant and abbreviated language of the 1983 Constitution, coupled with the state’s police power under the “vital areas” language may provide some basis for an argument that the General Assembly is no longer prohibited from enacting general land use and planning legislation. It is with this proposition in mind that this paper will attempt to “fix” Georgia’s checkered planning and zoning past with new legislation that could withstand a Constitutional challenge.

There are several convincing arguments to be made that would support the General Assembly’s enactment of planning legislation that would not only control the procedural aspects of a statewide plan, but could also mandate enforcement of such a plan.

Initially, it is important to note that the holding in Smith v. City of Atlanta has not been overturned by any subsequent decision by the Georgia Supreme Court. The power to zone must still come from a Constitutional grant.²⁵ However, the Court has occasionally referred to the state’s “inherent police power” in the context of zoning and has not always strictly relied on the power to zone as an express Constitutional grant. In Horne v. City of Cordele, the Court held that the destruction of a house as allowed under a Cordele statute without compensation would

²³ New Georgia Encyclopedia: Georgia Constitution. August 12, 2002. The New Georgia Enclyopaedia. April 19, 2007. www.georgiaencyclopedia.org

²⁴ Ga. Const. art. IX, §2, ¶4

²⁵ See Smith, 161 Ga. 769 discussed *supra*.

be valid if it were an exercise of the police power which is the “government’s inherent and plenary power over persons and property, having its origins in the law of necessity, which extends to all great public needs”.²⁶

Moreover, as Georgia’s cities and counties continue to grow at an unprecedented rate, it has become clear that there is an inherently important distinction between zoning and planning. They are no longer synonymous terms. Land use planning is the broader concept, zoning being but one of the several regulatory techniques available to land use planners and community officials.²⁷ This position is reflected in the Court’s holding in Pope v. City of Atlanta (Pope II). The Court noted that “the type of land use restriction involved in this case is unlike zoning...our case does not involve zoning but land use restrictions necessary for the public health and safety”.²⁸

Combined with the Court’s reasoning in Horne, it is safe to assume that land use regulations, which are different than zoning, according to Pope II, would be viewed by the Court as valid exercises of police power when they are codified as regulations whose origins lie in the law of necessity and naturally extend to all great public needs. Given the current state of Georgia in regards to transportation, the environment, quality of life for its citizens, and conservation of natural resources (water, greenspace) it is difficult to imagine a situation where legislation designed to plan for and mitigate future problems in these areas would not lie in the law of necessity and public need.

The Current State of Georgia's Planning and Zoning Enabling – Gerry Seyle

The 1983 Constitution, still the current State of Georgia Charter, put local control of

²⁶ Horne v. City of Cordele, 140 Ga. App. 127 (1976).

²⁷ Futrell, The Hidden Crisis in Georgia Land Use, 10. Ga. L. Rev. 53 (1975).

²⁸ Pope v. City of Atlanta (Pope II), 242 Ga. 334, 335 (1978).

zoning on the most solid bedrock imaginable – Article IX, Section II, Paragraph IV Planning and Zoning. “The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power.”²⁹

For those individuals and governments that believe that all zoning, planning, and growth management decisions should be controlled by the municipality or county most affected, this paragraph is the alpha and omega of their necessary authority. And yet, state efforts to 1) gain some control and consistency in the planning area, and 2) either authorize or mandate the use of common growth management tools have not been shut off. We’re going to look briefly at several manifestations of those efforts and then look specifically at steps that might be possible to get Georgia onto a state-directed smart growth path.

Since 1983, statutory and constitutional changes have affected these local zoning and planning powers. In a way, the brevity and concision of the zoning language of the 1983 Constitution can be seen as limiting the breadth of its effect despite the seeming unambiguity of the language. Thus, the 1983 Constitution itself, its subsequent amendments, and several subsequent statutes all seem to suggest that only a narrowly construed zoning power, as opposed to land use regulation, is reserved to local governments by the above paragraph.³⁰ Some examples of these broader powers reserved to the state are:

Vital areas – the General assembly has the power to restrict land uses to protect and preserve such areas.³¹

Federal compliance – the General assembly may exercise broad powers, including

29. GA. CONST. art. IX, § 2, ¶ 4.

30. Linda K. DiSantis, Constitutional Barriers to Statewide Land Use Regulation in Georgia: Do They Still Exist? 3 Ga. St. U. L. Rev. 249, 263-64 (1986-1987).

31. GA. CONST. art. III, § 6, ¶ 2(a)(1).

zoning, to bring the state into compliance with federal laws or programs³²

Georgia Regional Transportation Authority (GRTA) – With a board appointed by the governor and the power to control transportation funds, GRTA is seen as having the theoretical power to implement land use plans of at least some of the Regional Planning Districts like ARC.³³

Numerous others – e.g., Development Impact Fee Act, Urban Redevelopment Law, and Transfer of Development Rights (TDR) Act

There is much disagreement on the legal theories of how far local government zoning authority extends into the implementation of growth management tools. One theory assumes that the local government zoning authorization in the 1982 Constitution confers on those governments all the powers necessary to move into growth management. But, if that's true, why was it necessary for the General Assembly to enact, e.g., TDR capability. On the other hand, others like the Georgia Planning Association are “nervous” about that assumption and have looked to enabling legislation to empower local governments to adopt growth management tools.³⁴ The 1998 report of the Growth Strategies Reassessment Task Force supported that position, concluding that “existing laws were not up to the job of growth management.”³⁵

A yet more conservative position holds that even the General Assembly cannot empower local governments with growth management tools without constitutional changes. This view holds that, to the extent local governments are empowered to use such growth management/land

32. GA. CONST. art. III, § 6, ¶ 2(a)(3).

33. Janice C. Griffith, Smart Governance for Smart Growth: The Need for Regional Governments, 17 Ga. St. U. L. Rev. 1019, 1048 (2001).

34. Jerry Weitz, Update on GPA's Proposed Legislation, Georgia Planner, p. 4, June, 2001.

35. American Planning Association Legislation & Policy / The Statehouse, August, 2000, quoting Jerry Weitz (www.planning.org/statehouse/2000/aug00fts.htm)

use tools, that empowerment comes from the 1983 Constitution and not the General Assembly. Thus any such growth management empowerment acts are either unnecessary or unconstitutional.³⁶ However, in one of the few Georgia Supreme Court cases on point, the court held that state land use regulations restricting development on the Chattahoochee River were supported by the police powers and the “vital areas” provision of the constitution. Further, such regulations did not constitute zoning.³⁷ One possible logical extension of such court reasoning, coupled with the constricted zoning language of the 1983 constitution, is that “...the General assembly is no longer prevented from enacting general land use regulation statutes.”³⁸

The Georgia Planning Act of 1989 was the legislature’s attempt to “provide a framework to facilitate and encourage coordinated, comprehensive state-wide planning and development at the local, regional, and state levels of government...”³⁹ Among the specific actions the legislature took in this Act are:

1. Empowered the Department of Community affairs (DCA) to assist local governments in the preparation and implementation of comprehensive plans.
2. Direct DCA to assist the governor “...in the development of a comprehensive plan for the state.”⁴⁰
3. Established (or re-designated) local area planning commissions as Regional Development Centers (RDC’s).
4. Authorizes the appropriate RDC (e.g., for the Atlanta area, the Atlanta Regional Commission (ARC)) to review Local Plans, point out conflicts, and force local government reconsideration of their plans.⁴¹

It is worth noting that the sections of the Act authorizing RDC review and comment on local

36. Georgia Planning Association, Legislative Committee, White Paper on Planning and Zoning Legislation, April 6, 2002, p. 8

37. See DiSantis, supra note 2, at 267

38. See id. at 268

39. 1989 Ga. Act 634, Synopsis

40. O.C.G.A. § 50-8-7.1(A)(1)

41. O.C.G.A. § 50-8-37

plans end with “NOTHING IN THIS CODE SECTION SHALL LIMIT OR COMPROMISE THE RIGHT OF THE GOVERNING AUTHORITY OF A COUNTY OR MUNICIPALITY TO EXERCISE THE POWER OF ZONING.”⁴² Of course, being well aware of this caveat, local governments can and do disregard the comments and conflict reports submitted on the local plans by an RDC.

This leads us to the approach for amending Georgia’s planning and zoning laws to clear up confusion and enable the state to lead the move to smart growth principles. Assuming first that the General Assembly can act on statewide growth management matters without running afoul of the 1983 Constitution, we look for guidance to the efforts of the Georgia Planning Association in its Model Act of 2003. This proposed legislation never made it to the floor of the General Assembly, primarily due to lack of necessary support from formal and informal local government groups.⁴³ In order to move forward with recommended legislation, we will assume that both requisite local government support and statewide anti-sprawl concerns have paved our way.

We begin by clarifying any confusion over the empowerment of local governments to implement land use and growth management tools by enacting the enabling section of the Model Growth Management Enabling Act of 2003. This would make it clear that smart growth tools such as Development Agreements, Floating Zones, Rate of Growth Programs, Urban Growth Boundaries, and Incentive Zoning are available to the local governments. At the same time, such tools as TDR’s and Impact Fees are maintained as previously authorized by statute.⁴⁴ In addition, this local empowerment would reflect the APA’s Alternative 2 use of incentives to encourage

42. O.C.G.A. § 50-8-37(H)

43. See White paper, supra note 8 at 14.

44. Model Growth Management Enabling Act of 2003 (Georgia Planning association draft)

smart growth planning.⁴⁵

However, it is the never fully drafted portions of the GPA's proposed 2003 legislation that offer the most promise for bringing meaningful, state-led growth management strategies to Georgia. In this second phase of our proposed path, we would draw from the highlights of the 1998 report of the Georgia Department of Community Affairs Growth Strategies Reassessment Task Force, utilizing some of the concepts and methodologies of the American Planning Association (APA) Growing Smart Legislative Guide as well as relevant work from New Jersey. The main points are:

State Plan – provide policy direction for state, regional, and local actions necessary to implement the state comprehensive plan⁴⁶, which was called for in the Planning Act but has never been produced. Although the Planning Act left this to the Governor, DCA, with its role of coordinating the RDC's, would be best suited to produce this state plan

Local Requirements – would mandate that, in order to utilize the growth management tools enabled above, local governments would have to include growth management elements into their local comprehensive plans.⁴⁷

Regional Consistency – we would require that the current RDC/local government conflict analysis be expanded to provide more than the comment and delay authorized by the Planning Act. To actually resolve those conflicts with the Regional and State Plans we would include two additional steps:

*NJ-like Cross Acceptance*⁴⁸ – whereby local master plans are compared with the current version of the State Plan. Cross-acceptance will conclude with written

45. . § 2-104 APA (Alternative 2) Growing Smart Legislative Guidebook

46. § 4-204 APA Growing Smart Legislative Guidebook

47. § 7 APA Growing Smart Legislative Guidebook

48. N.J.S.A. 52:18A-202.b.

Statements of Agreements and Disagreements supported by each negotiating entity and the Governor's Development Council (or DCA). The negotiated agreements will be incorporated into the next version of the State Plan. The process is designed to ensure that all levels of government and the public are involved.

Inter-governmental Consistency – Under the direction of the appropriate RDC, local governments with significant planned future land use changes that are deemed to have an effect on a neighboring government will go through a mini Cross-Acceptance process led by the RDC. Both these levels of consistency through cross-acceptance would borrow both from the New Jersey statutes and the APA Legislative guidebook.⁴⁹

As has been the case in other states pursuing smarter growth directions, the orientation of the Executive will determine just how far suggestions such as those above can proceed. It may be that a few years of \$3-\$4 gas and mid-morning Downtown Connector gridlock could make smart growth a campaign issue for the opposition party.

Zoning/Planning Acts in Other States & RDC powers in Georgia – Sundaram Vedala

This sections starts with a description of home rule and planning related legislations in New Jersey. New Jersey is a home rule state - the Article IV, Section VII (11) of the New Jersey Constitution provides a strong constitutional and statutory foundation for home rule⁵⁰. This section of the New Jersey Constitution guarantees that:

49. § 7-401 et seq. APA [Growing Smart Legislative Guidebook](#)

⁵⁰ Trafford, John E., Home Rule in the 90's: Is it Alive or Dead? New Jersey State League of Municipalities website. Accessed Apr. 14, 2007. <http://njslom.org/homerule.html>.

"The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law."

The New Jersey Home Rule Act of 1917 provided equal powers to all types of local governments⁵¹. The types included city, borough, township, town and village. The state of New Jersey and its municipalities have attributes that differ from other states. One of these is that it is entirely composed of incorporated municipalities which means the state does not have any unincorporated areas.

New Jersey State Planning Act of 1985 can be described as:⁵²:

"Statewide planning and regional planning were very important for the state to conserve natural resources and to revitalize urban centers... The act established a State Planning commission in the Treasury Department... The commission's membership was to be drawn from urban and rural areas and represent a cross-section of state, county and municipal officials... The act created an Office of State Planning, also within the Treasury Department to monitor and report on progress toward the plan's goals... The new State Development and Redevelopment Plan would replace old DCA State Development Guide Plan and was expected to provide a coordinated, integrated and comprehensive plan for the growth and development of the state and its regions."

The provisions of the State Planning Act included provisions for cross-acceptance process. The cross-acceptance process required different entities to work cooperatively to achieve objectives. Furthermore, this process also implied that there was no agency that had an overall authority to enforce the provisions of the act. A comparison with the Georgia Planning Act of 1989 reveals that many of the Georgia Act's are similar to those of New Jersey. The main similarity is the role and responsibility of the state DCA in the states' legislations.

⁵¹ New Jersey State Library. New Jersey Municipal History and the Traditional Forms of Government. Accessed Apr. 14, 2007. http://www.njstatelib.org/NJ_Information/Digital_Collections/MFMG/MFMGCH1.PDF.

⁵² DeGrove, John M, Planning Policy and Politics: Smart Growth and the States, Lincoln Institute of Land Policy, Cambridge, MA, 2005.

Continuing the examination of home rule and zoning legislations of other states, we will briefly examine Massachusetts. Massachusetts is a state with home rule, established by the Home Rule Amendment Act in 1966. To complement the constitutional amendment and to promote uniform standards, the Home Rule Procedures Act was enacted, also in 1966.

The key provisions of the 1966 Home Rule Amendment Act include⁵³: municipalities may adopt charters without needing state approval; municipalities may not regulate elections, collect taxes, borrow money, define civil laws or regulations, define felonies or set imprisonment as a punishment for any offense, or dispose of park land, except as provided by the legislature; whether or not it has adopted a charter, any municipalities may exercise any power that the legislature has the power to delegate to it, except in cases where the legislature has already acted, explicitly or implicitly.

Prior to the enactment of the Home Rule Amendment, local governments could not adopt charters without state legislative approval. The home rule act changed this by authorizing municipalities to adopt new charters on their own.

The Massachusetts legislature passed the Zoning Act in 1975. A partial list of provisions under the act includes⁵⁴: procedures for adoption and amendment of zoning bylaws by municipalities; exemptions for pre-existing non-conforming uses, structures and lots; zoning enforcement; the basis for zoning appeals; zoning map requirements; and, public hearing procedures. Furthermore, the Massachusetts Subdivision Control Act, enacted in 1953, includes provisions for planning board approval of subdivision plans, endorsement of plans not requiring approval under the Subdivision Control Law, procedures for establishing planning board rules

⁵³ David J. Barron, Gerald Frug, and Rick T. Su, Harvard Law School. "The Myth of Home Rule: Local Power in Greater Boston". Rappaport Institute for Greater Boston, 2004, Cambridge, MA.

⁵⁴ Town of Hingham, MA website. Accessed Apr. 14, 2007. http://www.hingham-ma.com/document/Legal_Basis_of_Planning_and_Zoning.pdf

and regulations, submission of preliminary and definitive plans, and procedures for approval, modification or disapproval of plans and appeals of decisions.

Some contend that the Zoning Act encourages sprawl⁵⁵, while others contend that the section 6 provisions of the Zoning Act promote smart growth planning⁵⁶.

As the names reveal, the Massachusetts legislation is more zoning-oriented whereas the Georgia legislation is planning-oriented. The Georgia Planning Act is more comprehensive and provides fairly detailed description of the role of RDCs.

After a brief look at home rule and zoning/planning legislations in New Jersey and Massachusetts, we will now turn to the powers of Regional Development Centers in Georgia. The role of Regional Development Centers as initially mandated by the Georgia Planning Act, including⁵⁷: reviewing local plans and local government behavior; preparing a regional plan; managing the mediation of conflicts between local plans; providing technical assistance to local governments in preparing their plans; and, preparing local plans if contracted to do so.

The Georgia Department of Community Affairs (DCA) provides additional details about RDCs' roles and responsibilities⁵⁸. The DCA contracts annually with the RDCs for carrying out various activities related to implementing the Georgia Planning Act. The contracts are awarded in two major categories: contracts for non-discretionary services and contracts for discretionary services.

⁵⁵ Krass, Benjamin, Combating Urban Sprawl in Massachusetts: Reforming the Zoning Act through Legal Challenges. Accessed Apr. 14, 2007. http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcealr/30_3/08_FMS.htm

⁵⁶ Nutter McClennan * Fish LLP website. The American College of Real Estate Lawyers article. Accessed Apr. 14, 2007. http://www.nutter.com/publications_events.php?section=7&MediaID=34.

⁵⁷ DeGrove, John M, Planning Policy and Politics: Smart Growth and the States, Lincoln Institute of Land Policy, Cambridge, MA, 2005.

⁵⁸ Georgia Department of Community Affairs website, Accessed Apr 14, 2007. http://www.dca.state.ga.us/development/PlanningQualityGrowth/programs/regional_planning.asp.

The contracts for non-discretionary services include assisting local governments in the preparation of local comprehensive plans, review of local government plans for possible intergovernmental implications, assisting member governments in the mediation of certain intergovernmental conflicts, and maintenance of a statewide geographic information system to support planning efforts.

Types of discretionary projects funded under the DCA contract include assisting local governments with specific plan implementation activities, innovative programs or activities that promote multi-county or regional development, and activities that will enhance designated regionally important resources.

The Georgia Department of Community Affairs' Regional Standards 2007 Draft provides information about the scope and contents of a Regional Plan⁵⁹. The purpose of the regional planning requirements is to provide a framework for preparation of regional plans that will involve all segments of the region in developing a vision for the future of the region, generate pride and enthusiasm about the future of the region, engage the interest of regional policy makers and stakeholders in implementing the plan, and provide a guide to everyday decision-making for use by government officials and other regional leaders.

Overall planning requirements are categorized under two broad headings: 1) Plan Scope and 2) State Planning Recommendations. First, a description of the contents of Plan Scope follows. A regional plan meeting these planning requirements must include three components: a Regional Assessment; a Stakeholder Involvement Program; and, a Regional Agenda. The Regional Assessment part of the regional plan is an objective and professional assessment of data

⁵⁹ Georgia Department of Community Affairs, Regional Standards Draft 2007, Accessed Apr. 14, 2007. <http://www.dca.state.ga.us/development/PlanningQualityGrowth/programs/documents/RegionalStandards2007Draft102906.doc>

and information about the region that is intended to be prepared without extensive direct stakeholder involvement. The second part of the regional plan is a Stakeholder Involvement Program that describes the RDC's strategy for ensuring adequate public and stakeholder involvement in the preparation of the Regional Agenda portion of the plan. The third part of the regional plan is the most important, for it includes the region's vision for the future as well as the strategy for achieving this vision.

Second, the State Planning Recommendations provide supplemental guidance to assist communities in preparing plans and addressing the regional planning requirements. The plan preparers and regional stakeholders must review these recommendations where referenced in the planning requirements in order to determine their applicability or helpfulness to the region's plan.

Survey of RDCs – Gregory Suber *(NOTE: For all references to survey, see Appendix 1)*

Varying widely from the coast to the Alabama border, and from the Black Belt to Metro Atlanta and further to the northern mountain regions, Georgia's Regional Development Centers (RDCs) also vary depending on geography, economics, resources, and social issues.

Due to the dramatic differences between Metro Atlanta and the rest of the state, the region's RDC, the Atlanta Regional Commission (ARC), is significantly different than others. For example, ARC is the designated Metropolitan Planning Organization (MPO) under the Federal Highway Act, meaning that it deals directly with the federal government regarding transportation projects⁶⁰. The Commission also is a combination of several organizations dealing with issues such as aging, workforce, and water resources. In contrast to other RDCs, ARC also has significant leverage in reviewing, and subsequently recommending changes, to area plans.

⁶⁰ Atlanta Regional Commission. The Bylaws of the Atlanta Regional Commission. February 23, 2005, p. 5

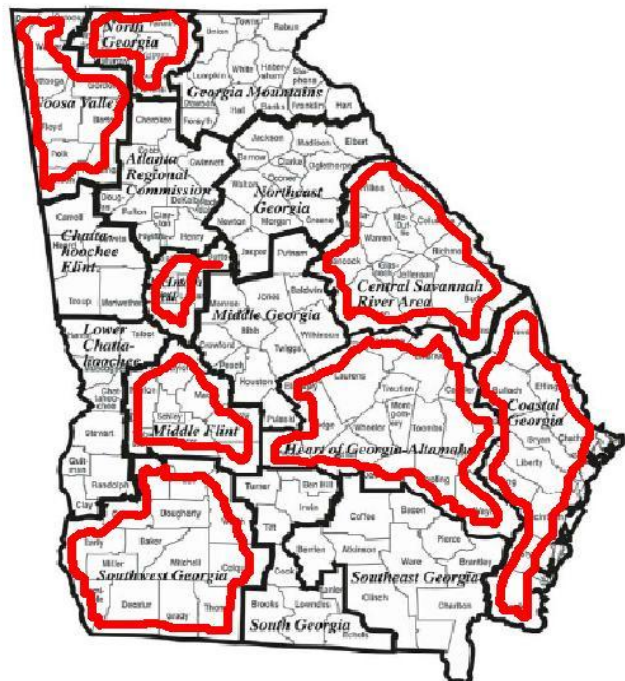
Such functions come from the fact that the RDC's population is greater than 1 million, making ARC a Metropolitan Planning and Development Commission⁶¹ under Georgia law. In other areas of the state, RDCs are separate from other regional organizations such as MPOs and have fairly little to say in a home rule state. As one planning director states: "we have no legal authority to enforce, unlike ARC."

In order to further understand the differences between the RDCs, we conducted an e-mail survey of the 15 RDCs outside of Metro Atlanta. This survey included the following questions:

1. How does your RDC communicate with municipalities;
2. Does your RDC have a master plan for the area;
3. If so, how is it enforced and by whom; and,
4. Have there been problems/issues with municipal zoning or planning in relation to your RDC's goals?

Out of the 15 surveys sent out, we received 8 responses. While this response rate is only slightly above 50%, the responses came from RDCs covering the vastly different geographic and economic regions of the state. These RDCs include:

1. Coosa Valley RDC;
2. North Georgia RDC;
3. McIntosh Trail RDC;
4. Central Savannah River Area RDC;
5. Middle Flint RDC;
6. Heart of Georgia - Altamaha RDC;
7. Coastal Georgia RDC; and,
8. Southwest Georgia RDC.



⁶¹ Title 50. State Government. Chapter 8. Dept. of Cor Development Commissions. O.C.G.A. 50-8-82.

As could be imagined, responses to each survey question also varied widely according to geography and demographics. The following provides a summary of similar responses from various RDCs. Immediately following are outliers reflecting the geographic and demographic differences among RDCs.

How does your RDC communicate with municipalities?

Communication between RDCs and municipalities generally revolves around simple methods, including e-mail, telephone, facsimile, websites, and traditional mail including newsletters. Most RDCs have monthly Board of Directors meetings comprised of elected officials and private sector representatives, which are supplemented by face-to-face visits from RDC staff.

It is clear that different RDCs are either more or less communicative than described above. For example, the Coosa Valley RDC administers additional programs such as the Area Agency on Aging and the Workforce Investment Act in conjunction with the North Georgia RDC. Conversely, the Middle Flint RDC no longer produces a newsletter due to lack of interest, and several RDCs rarely hold face-to-face meetings and rely almost completely on e-mail. Three RDCs reported that their respective websites were slightly or significantly outdated.

Does your RDC have a master plan for the area?

As RDCs are required to have a comprehensive regional plan as mandated by the Georgia Planning Act of 1989, it was expected that each respondent would confirm having a plan. While

this was generally the case, some RDCs reported updating their plans annually, every 5 years, every 10 years, or even longer. Some RDC representatives admitted that their regional plans were extremely out-of-date, including the Coastal Georgia RDC, although its plan is being revised under the Coastal Comprehensive Plan. This plan is being completed by DCA under the Governor's executive order in 2005. However, this plan will not include all counties of the Coastal Georgia RDC and, according to the RDC Planning Director, it is not clear which entity will enforce the plan.

If so, how is it enforced and by whom?

Most RDCs review local government plans for consistency with the regional plan, although all respondents emphasized their lack of authority to enforce their plans. RDCs generally rely on cooperation and communication among local governments and the RDC, while DCA enforces the technical correctness of the plans.

Have there been problems/issues with municipal zoning or planning in relation to your RDC's goals?

Again, RDCs mostly rely on cooperation and coordination among local governments and replied that there has been little conflict in zoning. Issues of funding, lack of resources, and similar demographics have led several RDCs to cooperate in completing a regional plan. For example, the McIntosh Trail and Chattahoochee-Flint RDCs combine to become the Southern Crescent. Similarly, the Coosa Valley and North Georgia RDCs cooperate in completing a comprehensive plan for the region. As mentioned previously, these northeastern RDCs also jointly administer programs in the area. However, several RDCs mentioned interjurisdictional

conflicts which have required formal mediation, particularly concerning developments of regional impact.

Other troublesome issues are new growth in areas which were not previously zoned for growth. Also, municipal zoning is spotty in many places without planners or officials with any professional training. These areas more often forego zoning in favor of any investment or development enjoyed by more urban areas of the state.

Several RDCs expressed frustration in their survey responses, reflected by the following quote from the Southwest Georgia RDC:

“Our plans have no teeth – we monitor for progress on issues and are responsible for keeping the plan updated, but if an issue goes unaddressed, there is no mechanism to require it to be done.”

Georgia Tech City and Regional Planning alumnae Tricia Reynolds, the planning director for the Coastal Georgia RDC, was particularly vocal regarding powers of RDCs themselves and in comparison with ARC:

“The ARC has special authorities granted by the General Assembly, and it might be possible – through the Legislature – for the Coastal Georgia RDC to be granted authority to implement and enforce the recommendations set forth in the Coastal Comprehensive Plan once it is completed. I am all for more authority – although we would need more money from the state in order to do the enforcement. Right now we are merely advisors trying to get our counties to look at, and accept the big picture and how ‘doing the right thing’ for the good of the region would be good for them.”

It is obvious that by giving more power to Georgia’s RDCs, consistency in zoning and land use would increase, mostly in the fast-growing areas outside of Metro Atlanta. However, it could most likely be assumed that relatively impoverished areas would continue to forego any greater regulatory or enforcement powers in favor of investment or development. Despite this assumption, enabling all RDCs to further manage zoning would ultimately provide benefits to all regions, whether they choose to use the power or not, by merely granting them the option.

Programmatic/ Legislative Suggestions based on Model Program – Maureen Tighe

"Partnerships are critical to build consensus, and developing a true sense of trust among and between state and local government officials remains a critical challenge."

-Prof. Patricia E. Salkin ⁶²

The second part of this paper focuses on RDCs and the level of consistency that is needed between regional planning agencies and other governmental planning departments. However, obtaining a higher level of connectivity requires more than increased activity at the regional level. Georgia, being a home rule state, requires a close look at local growth issues. According to Prof. Patricia E. Salkin, it has been shown that municipalities favor the following ideas:

"required funding for roads and highways to be linked with local plans; an increase in incentives for localities to pursue smart growth; targeting infrastructure funding to designated growth areas; incentives for seeking regional solutions; and more technical assistance.

In addition, municipal officials support: tax incentives for developers to build in designated growth areas; more tax benefits for historic properties; more incentives for brown field redevelopment; and leveraging participation through incentives".

These ideas are possible through an amendment to update the current zoning/enabling acts of Georgia.

We are proposing an incentive-based amendment that will create more cohesion among planning agencies at a regional level, while still protecting local areas. Having the amendment be based on the "carrot" vs. the "stick" approach will allow more flexible zoning/land use controls.

Tools that might be utilized are TDR's, PDR's, PUD's, and ADR. Money, used for incentives, can be offered in exchange for "planning, open space purchases, and technical

⁶² Patricia E. Salkin, Smart Growth: The State of the States Tales of Leadership and Vision
Prof. Patricia E. Salkin, Associate Dean and Director; Government Law Center of Albany Law School
April 3, 2001 <http://law.wustl.edu/landuselaw/smartgrowth.html>

assistance; there are incentives for private land conservation incentives; and mechanisms to continue state-level oversight, reviews and reports". These incentive-based concepts are analogous to our goal of creating stronger RDC's, allowing more control at the state and regional level, all the while keeping a level of control at the local level.

The APA has created a legislative guide entitled Growing Smart⁶³ to help with this type of planning agenda that modernizes enabling acts and works with local governments on implementation of said strategies. The legislative guidebook is divided into fifteen chapters that cover issues ranging from initiating an update to current legislation to the types of programs it encompasses. Though the guide is specifically aimed at Smart Growth, the policies and legislative steps are applicable to amending current zoning/enabling legislative issues facing Georgia. We have pulled suggestions on how Georgia's current legislation can be amended from this guide, with a focus on zoning/enabling issues verse the more comprehensive subject of smart growth.

Of the four models of policy choices given in the *Purposes and Grant of Power* section, the second and fourth choices are the most supportive/applicable for a home rule state such as Georgia. The second choice states: "planning as an activity to be encouraged through incentives". The fourth touches upon the need for consistency and comprehensiveness that is called for at the regional levels: "mandated state-regional-local planning that is integrated both vertically and horizontally". The two could be integrated to form a logical approach to updating Georgia's current act. The model then "describes a series of long-range state interests that all levels of government must take into account when exercising planning authority." Finally, the

⁶³ American Planning Association's Growing Smart Legislative Guidebook:
Model Statutes for Planning and the Management of Change
2002 Edition (Stuart Meck, FAICP, Gen. Editor)
<http://www.planning.org/growingsmart/>

legislation includes language that grants planning powers to local government. Chapter seven goes into more depth on planning powers and authorities operate on the local level.

The first part of *Local Planning* discusses power distribution and the relationships between local governing bodies, including a possible planning commission, should the need arise. It also discusses the involvement of neighborhood and community associations. The second part gives the details of the mandatory elements of a comprehensive plan since the model is aimed at Smart Growth. The third part "sets forth procedures for plan review, adoption, and amendment."

There is an optional procedure for "state approval of regional and local comprehensiveness plans, with an appeal to a state comprehensive plan appeals board". Though this might seem like too much power is being taken away from localities, which could easily be looked down upon in a home rule state, municipalities would also be "able to appeal to the board urban growth area designations by a regional or county planning agency if an agreement cannot otherwise be reached". This allows for some protection of local rights so that the power structure is balanced.

This approach also calls for a greater level of public involvement than a single mandatory meeting, which reinforces power at the community level. "It offers a model statute to guide local governments in ensuring that the plan preparation process engages the general public." The fourth part discusses implementation and responsibilities of other non-governmental organizations that would take part in administrative tasks. These include corridor mapping and local budgeting.

Chapter eight is concerned with *Local Land Development Regulation* and model statutes that would authorize local governments to create development regulations. Specific topics

include zoning, subdivision, planned unit development, uniform development standards, nonconforming uses, and development agreements. An important aspect of this chapter is that the model attempts to create a model of consistency between local comprehensive plans and land development regulations or specific development proposals. Again, this emphasizes the consistency that is lacking, among the different planning agencies of many states, not just Georgia's, at all levels. Local communities could be encouraged to participate and adopt said programs that, for example, could provide density and intensity incentives in exchange for affordable housing, good community design, and open space donation (model statute 9-501).

Chapter twelve is the discussion of *Integrating State Environmental Policy Acts with Local Planning*. Again, this touches upon how consistency is needed between local and state-level governmental planning agencies. This section describes ways of 'evaluating the environmental effects of local comprehensive planning and integration problems between state environmental policy acts and where they exist in local planning.'

Of the three alternatives, the most viable for Georgia is the first, which requires the local planning agency to prepare a written environmental evaluation of several elements of its plan. This alternative is best since it is not "binding on the local government in a regulatory sense and does not involve a state environmental policy act that applies to specific projects or land-use actions, such as single-tract rezonings or conditional use permits". This is another protection for local authorities against unreasonable state review.

Chapter thirteen, *Financing Required Planning*, describes how funding can be made available for these additional planning measures and has examples of model statutes. The one, which looks to have the least impact on local authorities and therefore the most appealing to Georgia, is section 13-201, the Smart Growth Technical Assistance Act. "It creates a state

program under which grants may be made to regional planning agencies and local governments to support their 'smart growth' planning activities.” This is closely connected with Chapter fourteen, and the need to provide incentive for rural or suburban areas.

Larger metro areas often have more resources as well as a more obvious need for planning. However, as extensive growth in the past decade has shown, suburban and rural areas that have catered to metro area needs have grown uncontrollably and need to have planning integrated with growth as problems such as water shortage and air pollution are becoming more prevalent. A result of this is a disparity among currently rural areas and booming metro areas. This part of the model legislature presents two models to help deal with this disparity so that the rural areas are treated fairly though they lack resources. For example, rural towns not within a greater metro area might see little need to control growth, and might be willing to take anything they can get in terms of development. However, rural jurisdictions that rely on metro areas for resources should accommodate planning measures needed in the urban areas so that the metro area can continue to thrive and provide those much needed resources (jobs, education, etc...).

Of the models presented, the one that is the most applicable to updating the zoning/enabling act is the first, since our suggestions are based on an increased level of comprehensiveness and consistency between regional agencies. This model is a "regional tax-base sharing legislation, by which the growth in commercial, industrial, and high-value residential components of the regional property tax base is shared among local governments". This is ideal for the rural localities that might not support planning initiatives for fear that it would limit economic growth. The model includes laws for designation of agricultural districts, which are then assessed at its agricultural use value, versus its value should it be converted into a strip mall, which is called "differential assessment". For areas where redevelopment is

encouraged, there is model legislation for "redevelopment, tax increment financing, and tax abatement".

Conclusion

This paper has examined the history of Georgia Legislature, state examples of home rule, legislation and zoning, current RDCs and an example legislative model. Our suggestions on how to amend the current constitution are based on this research. These suggestions are based on the goals of constitutionality, consistency among planning agencies, preservation of local power, how current RDCs perform, and how they can gain more.

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