Georgia State University Law Review

Volume 2
Issue 2 *Spring/Summer 1986*

Article 37

3-1-1986

Judicial Review of Georgia Zoning: Cyclones and Doldrums in the Windmills of the Mind

James S. Altman

Paul Bolster

James L. Bross

Follow this and additional works at: https://readingroom.law.gsu.edu/gsulr

 Part of the Law Commons

Recommended Citation

James S. Altman, Paul Bolster & James L. Bross, *Judicial Review of Georgia Zoning: Cyclones and Doldrums in the Windmills of the Mind*, 2 Ga. St. U. L. Rev. (1986).
Available at: https://readingroom.law.gsu.edu/gsulr/vol2/iss2/37

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

GEORGIA STATE UNIVERSITY
LAW REVIEW

VOLUME 2 NUMBER 2 SPRING/SUMMER 1986

JUDICIAL REVIEW OF GEORGIA ZONING: CYCLONES AND DOLDRUMS IN THE WINDMILLS OF THE MIND*

James S. Altman,† *Paul Bolster*,†† and *James L. Bross*†††

"The Zoning Law in Georgia is extraordinary, if only because it is so different from the law in all the other forty-nine states."[1]

I. Early Georgia Zoning Laws: Forth, Back, Forth, and Back Again.

Constitutional Reversal of Judicial Recalcitrance

The history of zoning law in Georgia reveals the struggle of a state's legislature and courts to deal with an idea which clearly was not trusted by either group. Georgia's first zoning law[2] was

* Copyright © 1986 by James S. Altman, Paul Bolster, and James L. Bross.

†Associate with the law firm of Richard D. Ellenberg, P.C., Atlanta, Georgia; B.A., Macalester College, 1977; J.D., Georgia State University College of Law, 1985.

††Associate with the law firm of Alston & Bird, Atlanta, Georgia; B.A., Eastern College; Ph.D., University of Georgia; J.D., Georgia State University College of Law.

Member of the Georgia General Assembly, 1975-1986; Professor of History, Clark College, 1972-1986.

†††Professor of Law, Georgia State University College of Law; A.B., Catholic University, 1966; J.D., Catholic University, 1969; LL.M., University of Pennsylvania, 1971.

Consultant on Land Use Legislation, Georgia General Assembly, 1983-1986.

1. N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW § 6.24, at 156 (1974).

2. 1921 Ga. Laws 665, §§ 1-A—1-H (amended the Charter of the City of Atlanta and

Published by Reading Room, 1986

HeinOnline -- 2 Ga. St. U. L. Rev. 97 1985-1986

adopted in 1921, before the United States Supreme Court held in *Village of Euclid v. Ambler Realty Co.*[3] that zoning was a permissible exercise of police power by the state. Under *Euclid*, restricting an owner's right to free and unfettered use of land through zoning laws was not an unconstitutional taking of the land, so long as the restrictions were reasonable.

About nine months before *Euclid*, the Georgia Supreme Court had reached exactly the opposite conclusion when it decided the case of *Smith v. City of Atlanta.*[4] *Smith* (hereinafter "*Smith I*") challenged a 1921 statute empowering the City of Atlanta to adopt zoning regulations "in the interest of the public health, safety, order, convenience, comfort, prosperity or general welfare. . . ."[5] *Smith I* relied upon the lower federal court's opinion that the *Village of Euclid's* zoning ordinance was beyond the police power.[6] In the following year, *Smith* (hereinafter *"Smith II"*) returned to the Georgia Supreme Court,[7] which reaffirmed *Smith I.*

In response to the pronouncement by the Georgia Supreme Court that the power to zone was not within the state's inherent police powers, the legislature amended the state's constitution to grant zoning authority to specific units of government within the state.[8] The first such specific authority appeared in a 1927 constitutional amendment which granted the power to zone to certain cities;[9] other cities[10] and counties[11] were added to the list over

---

applied only to Atlanta).

3. 272 U.S. 365 (1926).

4. 161 Ga. 769, 132 S.E. 66 (1926) (ordinance based on state enabling act). In *Smith*, the property zoned residential was on a major thoroughfare near a railroad track. Ms. Smith desired to open a retail store. *Id.* at 770-71, 132 S.E. at 66-67.

5. 1921 Ga. Laws 665 § 1-A.

6. *Smith*, 161 Ga. at 776, 132 S.E. at 69, *citing* Ambler Realty Co. v. Village of Euclid, 297 F. 307 (N.D. Ohio 1924), *rev'd* 272 U.S. 365 (1926).

7. City of Atlanta v. Smith, 165 Ga. 146, 140 S.E. 369 (1927). *See also* Morrow v. City of Atlanta, 162 Ga. 228, 133 S.E. 345 (1926) (zoning ordinance based on inherent power of city held violative of both Georgia and United States Constitutions).

8. The court reaffirmed this position in Hunt v. McCollum, 214 Ga. 809, 810, 108 S.E.2d 275, 276 (1959), when it said: "Without constitutional sanction no one could exercise such power."

9. 1927 Ga. Laws 127. The 1927 amendment included the cities of Atlanta, Savannah, Macon, Augusta, Columbus, LaGrange, Brunswick, Waycross, Albany, Athens, Rome, Darien, Dublin, Decatur, Valdosta, Newnan, Thomaston, East Thomaston, and any other city whose population reaches 25,000 people. *Id.*

10. In 1935 a local constitutional amendment added Moultrie to the list. 1935 Ga. Laws 1234. In 1936 further amendments added Forsyth, Milledgeville, Cordele, Carrollton, Eastman, Fort Valley, McRae, Dalton, and Quitman. 1937 Ga. Laws 1132, 1937 Ga. Laws 1137, 1937 Ga. Laws 1139.

11. 1937-38 Ga. Laws Extra Sess. 414; 1939 Ga. Laws 403; 1941 Ga. Laws 592.

time. None of these amendments was self-executing, so implementation of zoning power under each constitutional amendment required a subsequent enabling act to be passed by the General Assembly.[12] This "extraordinary," two-step authorization process was an artifact of the General Assembly's lack of authority to zone within police power. Specific grants of power in the state constitution gave the General Assembly no power to zone but "the general authority to authorize" and regulate the exercise of zoning by local units.[13]

Despite the ratification of Georgia's constitutional amendment in 1928 approving zoning, the supreme court continued to construe narrowly the powers granted by the amendment. In one of the first cases decided under the new constitutional provision, *Howden v. Mayor of Savannah*,[14] the court sustained the validity of the challenged zoning ordinance, going to some length to cite cases from jurisdictions holding zoning to be a legitimate exercise of the police power. Although the holding in *Howden* might have suggested judicial realignment by Georgia's highest court on the issue of zoning, that was clearly not the case.

Five years after *Howden*,[15] the supreme court struck down a zoning ordinance adopted by rural Glynn County because the county was not specifically included in the list of local governments authorized to zone.[16] The court, reading the zoning amendment narrowly, concluded that there was no inherent authority to zone absent a specific constitutional grant; and since counties were not then included in the original list of government units approved to zone,[17] Glynn County had no authority to zone.[18]

As the pressure to plan growth became greater, the restrictive rulings of the supreme court meant that each enlargement of the zoning power in Georgia required a new constitutional amendment followed by an enabling act by the legislature. Judicial hostility to zoning cases became more pronounced as more power was granted, and judicial review was reduced to mechanical repetition with little

12. 1927 Ga. Laws 127, 128.

13. *Id.*

14. 172 Ga. 833, 159 S.E. 401 (1931) (power of city to zone residentially in the middle of a growing business district).

15. Commissioners of Glynn County v. Cate, 183 Ga. 111, 187 S.E. 636 (1936).

16. The first constitutional amendment granting zoning power to counties was passed in 1937, the year after the *Howden* decision. *See* 1937 Ga. Laws 1135.

17. 183 Ga. at 113, 187 S.E. at 637.

18. *Id.*

HeinOnline -- 2 Ga. St. U. L. Rev. 99 1985-1986

cognizance of the facts in particular cases.[19] While procedural challenges, usually concerning notice,[20] were successfully brought, substantive challenges on the wisdom of decisions were rare in the early cases.[21]

During the 1930's and 1940's, more actions were brought by neighbors to enforce zoning regulations[22] than were filed by developers to challenge the zoning of their land. Until this line of cases waned in the 1950's, the neighbors consistently won their challenges. Developers' cases challenging the zoning classification of individual parcels started in earnest after World War II.[23]

In the 1945 revision of the Georgia Constitution, the legislature eliminated the specific enumeration of cities and counties eligible for a legislative grant of zoning power and authorized such grants to any city or county.[24] This further eroded the impact of the restrictive supreme court rulings on the expansion of zoning in the state. Enabling legislation was still required for each grant of planning and zoning power to individual counties and municipalities.[25] While control over the zoning power may have been wrested from the judiciary, it did not pass to Georgia's local governments, but

---

19. *See infra* notes 35-39.

20. *See* Sirota v. Kay Homes, 208 Ga. 113, 65 S.E.2d 597 (1951) (neighbors' successful challenge to commercial rezoning based on failure to post "12 feet square" notice as required by ordinance; developer's defense that "12 feet square" in ordinance was typographical error for "12 square feet" unsuccessful); *see also* Jennings v. Suggs, 180 Ga. 141, 178 S.E. 282 (1935) (landowner's challenge to rezoning successful when city failed to follow the notice provisions of its charter requiring a sign on the property and publication of notice specifying the location of the hearing).

21. *See* Schofield v. Bishop, 192 Ga. 732, 16 S.E.2d 74 (1941). The court found authority to introduce zoning to the City of Macon in phases by distinguishing language of enabling act for Macon ("authority to pass zoning") from Atlanta's charter language ("*comprehensive* scheme of planning and zoning") (emphasis added). The court then used substantive standards for which it cites no precedent to uphold residential zoning against a proposed commercial use. *See also* Awtry and Lowndes Co. v. Atlanta, 78 Ga. App. 390, 50 S.E.2d 868 (1948) (attempt by board of zoning appeals to refuse permit to undertaker's business held unreasonable and arbitrary, where undertaker had a right to conduct business under the standards set forth in existing zoning).

22. *See* Morris v. Lunsford, 176 Ga. 49, 167 S.E. 297 (1933) (ice plant in residential zone); Enzor v. Askew, 191 Ga. 576, 13 S.E.2d 374 (1941) (gas station in a residential zone); Snow v. Johnston, 197 Ga. 146, 28 S.E.2d 270 (1943) (funeral home in residential zone); Graham v. Phinizy, 204 Ga. 638, 51 S.E.2d 451 (1949) (apartments in single-family district); Atlantic Refining Co. v. Spears, 211 Ga. 787, 89 S.E.2d 177 (1955) (gas station in a residential district).

23. The rise of such challenges during the post-war building boom may parallel the re-emergence of similar challenges during the Sunbelt building boom. *See infra* note 71.

24. GA. CONST. OF 1945, art. III, § VII, ¶ XIII.

25. *Id.*

remained in the General Assembly.

Recalcitrance Becomes Denial

The case of *Humthlett v. Reeves*[26] began a trend limiting judicial review of zoning cases which is still apparent in Georgia zoning cases today.[27] In *Humthlett*, the supreme court held that the constitution granted zoning power solely to the "governing authority" of a local government, and no other body or agency could be vested with that power. Consequently, the action in *Humthlett* by the planning commission could not be zoning and had no force of law.[28]

Characterizing zoning as a "legislative" act, the *Humthlett* court ruled that the decision of a local governing body would not be disturbed simply because there might be a more profitable use of the land. Only upon a showing of an abuse of discretion or an unreasonable classification would a zoning decision be overturned.[29]

Although it characterized zoning as "legislative," the supreme court required strict compliance with zoning procedures by the governing authority. In *Toomey v. Norwood Realty Co.*,[30] which was decided one month before *Humthlett*, the issue before the Georgia Supreme Court was the adequacy of a remedy at law for aggrieved property owners whose right of appeal was to a board of zoning review.[31] The court held that the allocation of powers to a zoning review board was illegal because the enabling act vested the power to zone in the governing body, which in this instance was the Commissioner of Roads and Revenues.[32]

As *Toomey* had limited review by administrative bodies, *Hunt v.*

---

26. 212 Ga. 8, 90 S.E.2d 14 (1955).

27. *See, e.g.*, Bentley v. Chastain, 242 Ga. 348, 249 S.E.2d 38 (1978); Royal Atlanta Dev. Corp. v. Staffieri, 236 Ga. 143, 223 S.E.2d 128 (1976).

28. 212 Ga. at 13-14, 90 S.E.2d at 18-19.

29. *Id.* at 15, 90 S.E.2d at 19.

30. 211 Ga. 814, 89 S.E.2d 265 (1955). (The Commissioner did not decide case on date of hearing, but simply filed the zoning resolution eight months after the hearing and back-dated the resolution to date of hearing on face of resolution.)

31. *Id.* at 818-19, 89 S.E.2d at 268-69.

32. *Id.* at 818. The characterization of acts by single commissioners—who have sometimes combined executive, legislative, and judicial functions—and by appointed commissions as legislative, Martin Marietta Corp. v. Macon-Bibb County Planning & Zoning Commission, 235 Ga. 689, 221 S.E.2d 401 (1975), indicates that the label is being used in a conclusory manner to denote "whoever or whatever is empowered to enact zoning." It does not indicate a considered application of the label under the separation of powers doctrine or under decision theories of administrative law. *See infra* notes 108-114.

McCollum[33] limited judicial review. The court, again construing the constitution to reserve the zoning power only to the governing authority, reversed a trial court's order which had rezoned the land at issue. The statute granting *de novo* review was voided because it purported to convey to the lower court a power reserved to the governing body.[34] This view of judicial power remains the law; the courts have fashioned a remedy to fill the vacuum.[35] Procedural challenges continued to receive heightened scrutiny even while substantive scrutiny waned.[36]

Substantive scrutiny reached its nadir, and the court's hostility to zoning review reached its apex, in *Vulcan Materials v. Griffith*.[37] The court said that the Georgia Constitution and General Assembly had granted the power to zone " 'as they may see fit' " to local units.[38] That plenary grant left the courts with no scope of review. The court, almost bitterly, described the powerlessness of the courts to preserve the former primacy of private property after the people changed the state constitution. Under *Vulcan*, "spot zoning," the illegal selection of a single owner's property for special treatment on the map, became moot in Georgia.[39]

Shortly after *Vulcan*, the court asserted that zoning power was

---

33. 214 Ga. 809, 108 S.E.2d 275 (1959).

34. "A *de novo* appeal would substitute a jury for a municipal council or county commissioner, and to that extent it would offend the constitution." *Id.* 214 Ga. at 810, 108 S.E.2d at 276.

35. *See* City of Atlanta v. McLennan, 237 Ga. 25, 226 S.E.2d 732 (1976). The court's inability to create the solution, remanding to the local government for rezoning in accordance with court order, may have presaged the court's disinterest in reviewing zoning cases. *See* Vulcan Materials Co. v. Griffith, 215 Ga. 811, 816, 114 S.E.2d 29, 33 (1968).

36. Newman v. Smith, 217 Ga. 465, 123 S.E.2d 305 (1961) (neighbors' successful challenge to rezoning granted only two months after Board denied the same amendment; county procedure setting 12-month limitation on reinitiation of rezonings applied even where Board reconsidered rezoning on its own motion but at instigation of landowner; county's attempted waiver of its own limitation ineffective); Mayor of Waynesboro v. McDowell, 213 Ga. 407, 99 S.E.2d 92 (1957) (landowner's successful challenge to rezoning after amendment to the zoning plan passed without submission to the Planning Board as required by state enabling act); Sikes v. Pierce, 212 Ga. 567, 96 S.E.2d 427 (1956) (landowner's successful challenge to rezoning on due process grounds where city charter contained no provision for notice or hearing on amendments to zoning).

37. 215 Ga. 811, 114 S.E.2d .29. Norman Williams has characterized *Vulcan* as "overruling *Marbury v. Madison* in respect to Georgia zoning." N. WILLIAMS, *supra* note 1, at § 6.25.

38. *Vulcan*, 215 Ga. at 815, 114 S.E.2d at 32.

39. *See* Bible v. Marra, 226 Ga. 154, 161, 173 S.E.2d 346, 351 (1970) (rejecting plaintiff's contention that zoning was invalid, court cited *Vulcan* in support of its statement that authority for spot zoning is provided under Georgia law). *See infra* note 95.

not limited by other constitutional provisions, including by implication the "taking" clause.[40] The court retreated from this absolute position in *Hill v. Busbia*,[41] allowing the "taking" argument only if all use of land is denied by a zoning classification.[42]

Home Rule Absolutism

In 1966, the County Home Rule Amendment[43] gave counties a self-executing grant of power to zone unincorporated areas. The General Assembly lost control over exercise of county zoning power unless cities and counties created joint city/county planning and zoning commissions.[44] When confronted with the coexistence of the 1966 Home Rule Amendment and the 1945 article III provisions, the Georgia Supreme Court held that the later expression in 1966 implicitly repealed article III to the extent it was in conflict with the Home Rule provision.[45] County freedom from General Assembly control over zoning brought city efforts to achieve the same status. In 1972, the constitution was again amended, granting home rule self-executing zoning power to municipalities.[46] Because the court had restricted article III, the General Assembly was left without constitutional authority to affect zoning practices in the State.

II. GEORGIA AFTER *Barrett*: An Explosion of Developers' Cases; A Steady Expansion of Neighbors' Cases.

The Developers' Cases: The Taking Issue

In 1928, the United States Supreme Court established a framework for case-by-case analysis of the constitutionality of zoning as

---

40. Palmer v. Tomlinson, 217 Ga. 399, 122 S.E.2d 578 (1961). In the syllabus opinion, the court stated:

> Zoning regulations regularly enacted by a municipality pursuant to constitutional and legislative authority are valid and can not be held to be unconstitutional on the contention that constitutional authority to zone conflicts with other provisions of the Constitution, or upon the contention that rights guaranteed by the Constitution are denied as a result of the zoning regulation[s].

Id. at 399, 122 S.E.2d at 579.

41. 217 Ga. 781, 125 S.E.2d 34 (1962).

42. *Id.* at 782, 125 S.E.2d at 35.

43. GA. CONST. OF 1945 art. XV, § II, ¶ III (amended 1966).

44. *Id.*

45. Johnston v. Hicks, 225 Ga. 576, 579-80, 170 S.E.2d 410, 413 (1969).

46. GA. CONST. OF 1945 art. IX, § III, ¶ I(11) (amended 1972).

applied to individual properties in *Nectow v. City of Cambridge*.[47] Forty-seven years later, and fifteen years after the Georgia Supreme Court had seemingly abrogated judicial review of zoning decisions,[48] case-by-case review of developers'[49] challenges to zoning by Georgia local governments returned to the Georgia courts in *Barrett v. Hamby*.[50] Citing *Nectow*, the *Barrett* court established a balancing test for whether local regulation unconstitutionally takes private property without just compensation.[51] In that one opinion, Georgia moved into what Norman Williams has described as the "second period" (of judicial attitudes toward zoning) when "privately owned land could be made subject to broad restrictions on its use" but in "specific cases on the validity of zoning districts as mapped . . . the courts tended . . . to hold the restrictive regulations invalid as applied . . . ."[52]

Although *Barrett* paid deference to the United States Constitution and cited *Nectow*, the application of the "taking issue" by the

---

47. 277 U.S. 183 (1928). Until 1975, *Nectow*'s first and only citation by the Georgia Supreme Court was in Howden v. City of Savannah, 172 Ga. 833, 847, 159 S.E.2d 401, 407 (1931).

48. Vulcan Materials Co. v. Griffith, 215 Ga. 811, 114 S.E.2d 29 (1968).

49. The distinction between a "developer's case" and a "neighbors' case" is described in N. WILLIAMS, *supra* note 1, at § 2.01. The distinction is echoed in Georgia in the concurring opinion of Chief Justice Hill in *Wyman v. Popham*:

> Zoning cases fall at the outset into one of two major categories, each of which is quite separate and distinct: (1) suit by a landowner against the zoning authorities challenging the existing zoning . . . as being an unconstitutional taking . . . and (2) suit by a neighbor of rezoned property against the zoning authorities and the owner of such property challenging the rezoning. Decisions in one category are most often inapplicable to cases in the other category.

252 Ga. 247, 249-50, 312 S.E.2d 795, 797 (1984).

50. 235 Ga. 262, 219 S.E.2d 399 (1975).

51. As the individual's right to the unfettered use of his property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the [public welfare] . . . .

> As these critical interests are balanced, if the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void . . . . It suffices to void it that the damage to the owner is significant and is not justified by the benefit to the public.

Id. at 235 Ga. 265-66, 219 S.E.2d at 402.

The court interpreted "substantial" as being "more or less synonymous with 'reasonable'. . . and . . . clearly more than 'any' evidence." *Id.* at 265 n.1, 219 S.E.2d at 402 n.1.

52. N. WILLIAMS, *supra* note 1, at § 5.03 (1974). At the time of the first edition of the Williams treatise in 1974, one year before *Barrett*, "[a]lmost all states ha[d] gone through this stage." *Id.* at 104.

https://readingroom.law.gsu.edu/gsulr/vol2/iss2/37 HeinOnline -- 2 Ga. St. U. L. Rev. 104 1985-1986

United States Supreme Court has been much kinder to local land use regulation than Georgia's case law under *Barrett*; since *Nectow*, the United States Supreme Court has upheld every local land use regulation on which its taking rulings have reached the merits.[53] The more direct source of *Barrett* was the pro-developer taking law of the Illinois judiciary;[54] the opinion cited *Krom v. City of Elmhurst*[55] and *Weitling v. DuPage County*.[56] Illinois appellate courts generate more than fifty reported zoning opinions each year; the largest single category of cases involves application of the taking principles to individual zoned properties.[57]

In the first few years after deciding *Barrett*, the Georgia Supreme Court cited *Barrett* in almost every zoning case. Since there were refinements to be made to the broad principles announced in *Barrett*, the use of the case as a refrain was often appropriate; in some cases, the court included the ritual citation even when no party had challenged the zoning as a taking.[58] The history of appellate zoning decisions in Georgia since 1975 has been a sudden flood and then ebb of the taking cases which are actual applica-

53. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) (court upheld zoning ordinance, stating that landowner was neither denied the best use of the land nor fundamental attributes of ownership); Penn. Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (court upheld zoning ordinance which regulated dredging and excavating within the city limits, and which prevented landowner from continuing his business); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (court upheld designation of building as a landmark and restriction of the height of the building). The Georgia Supreme Court in *Barrett* acknowledged that *Nectow* was not the path followed in later cases by the United States Supreme Court. *See* 235 Ga. at 265 n.1, 219 S.E.2d at 402 n.1.

54. In discussing his "second period" of judicial attitudes, Williams observes that "Illinois is still clearly (and happily) resting there." N. WILLIAMS, *supra* note 1, at § 5.03.

55. 8 Ill. 2d 104, 133 N.E.2d 1 (1956).

56. 26 Ill. 2d 196, 186 N.E.2d 291 (1962).

57. Because it has concluded that the application of the taking issue to individual properties is not really a substantial constitutional problem, the Illinois Supreme Court reviews only three to six zoning cases each year. *See* First Nat'l Bank & Trust v. City of Evanston, 30 Ill. 2d 479, 197 N.E.2d 705 (1964). The remaining cases are decided by panels of the Illinois Court of Appeals, with the bulk originating in the districts including or bounding the City of Chicago. These data are derived from a review of all reported Illinois zoning decisions from 1977 to 1980.

58. *See, e.g.*, Columbia County v. Fleming, 240 Ga. 604, 241 S.E.2d 833 (1978) (school board's unsuccessful claim that required buffer between school and quarry was too small); Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977) (neighbors' challenge to a rezoning from residential to industrial); Riverhill Community Ass'n v. Cobb County, 236 Ga. 856, 226 S.E.2d 54 (1976) (another neighbors' challenge to a rezoning); Hall Paving Co. v. Hall County, 237 Ga. 14, 226 S.E.2d 728 (1976) (neighbors' unsuccessful claim that findings were needed for rezone).

HeinOnline -- 2 Ga. St. U. L. Rev. 105 1985-1986

tions of *Barrett*, and in a more continuous boomlet of cases in which no real taking issue has been raised.[59]

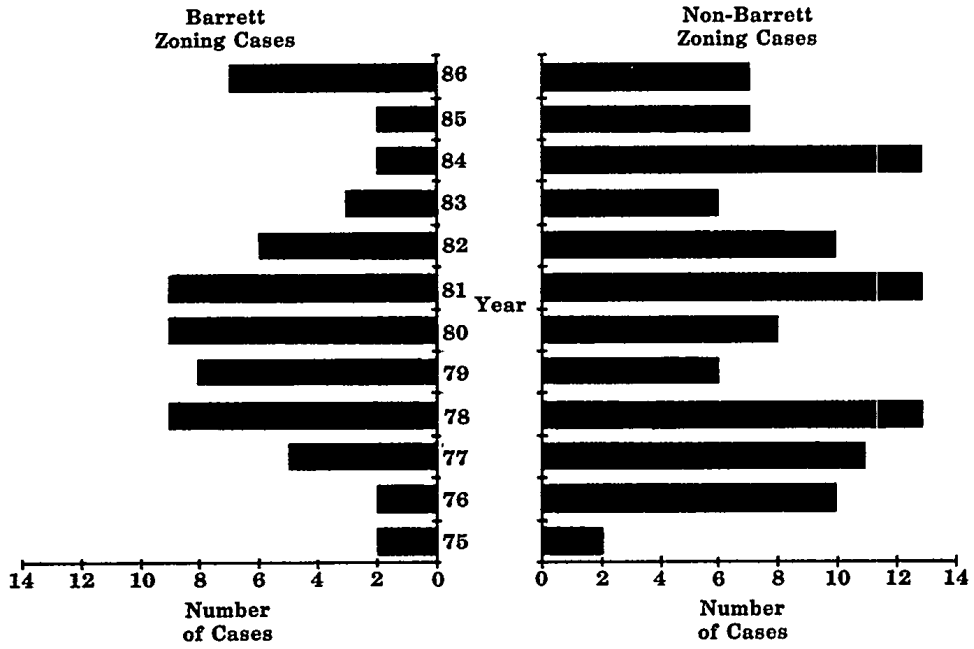


CHART I

Barrett Refined

In the history of reported applications of *Barrett*, local governments have won somewhat more cases (thirty-three) than developers (thirty-two).[60] Those wins by local governments have not resulted from judicial refinements which favor government positions or from heavy investments in litigation costs by local governments in the routine cases reported.

---

59. *See* Chart 1. The fall of substantive cases and the rise of procedural cases parallels an earlier period of Georgia judicial review. *See supra* note 39 and accompanying text.

60. *See* Chart 2. Local governments have lost all six *Barrett* cases in 1985 and 1986.

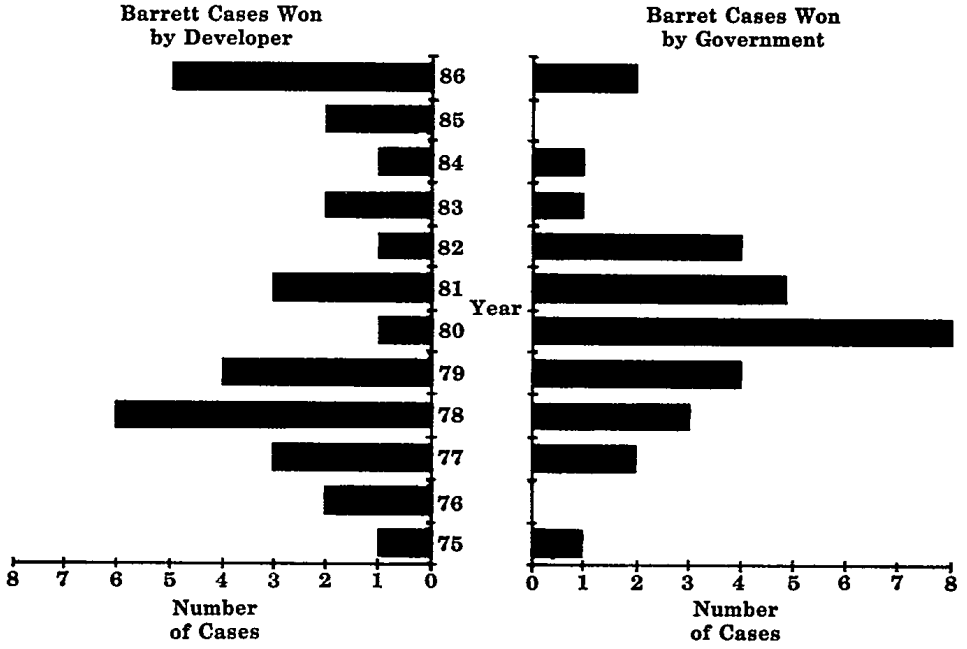


CHART 2

The major substantive elaboration of *Barrett* has been a further incorporation of Illinois case law into Georgia zoning; in *Guhl v. Holcomb Bridge Road Corp.*,[61] the Georgia Supreme Court adopted six criteria which identify the facts which may be taken into consideration in determining validity of an ordinance.[62] Proce-

61. 238 Ga. 322, 232 S.E.2d 830 (1977).

62. *Id.* at 323, 232 S.E.2d at 832. The criteria, known in Georgia as the *Guhl* standards, are: (1) [The] existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the property.
Id. at 323-24, 232 S.E.2d at 832 (quoting La Salle Nat'l Bank v. County of Cook, 60 Ill. App. 2d 319, 208 N.E.2d 430 (1965)).

Criteria (1) and (5) resemble language in the earlier Georgia case of Humthlett v. Reeves, 212 Ga. 8, 15, 90 S.E.2d 14, 19 (1955), but the immediate source of the criteria is Illinois law.

In Illinois, the standards are known as the "*La Salle Bank* standards" for their origin in La Salle Nat'l Bank v. County of Cook, 12 Ill. 2d 40, 145 N.E.2d 65 (1957). Because of the customary use of the Illinois land trust by owners of investment property in that state, large banks are named parties in roles as trustees in many zoning

HeinOnline -- 2 Ga. St. U. L. Rev. 107 1985-1986

dural clarifications have included (1) the refusal of jury trials requested by local governments,[63] (2) the establishment of a shift of the burden of proof to the government from the challenging landowner when the landowner has met his initial burden,[64] (3) a requirement that developers exhaust their administrative remedies by properly raising their constitutional challenges before local government bodies,[65] (4) the proper form of action for judicial review (mandamus unless otherwise specified by law),[66] (5) a widened

---

cases. As a result of this proliferation of trustee cases and constant reiteration of the standards ritualistically in cases, the Georgia court in *Guhl* cited *a* "La Salle Bank" case; that case in turn cited *the* "La Salle Bank" case. LaSalle Nat'l Bank v. County of Cook, 60 Ill. 2d 39, 208 N.E.2d 430 (1965), but not *the* "La Salle Bank" case. In a curious turnabout of the *Erie* doctrine, a federal court in Illinois adopted Illinois case law, including the *La Salle Bank* standards, as the basis of a case under the constitution. In Sternaman v. County of McHenry, 454 F. Supp. 240 (N.D. Ill. 1978), Judge McGarr cites only *Nectow* from the United States Supreme Court while citing eleven opinions of the Illinois courts.

63. Guhl v. Davis, 242 Ga. 356, 249 S.E.2d 43 (1978); *See* Russell v. Towles, 242 Ga. 358, 249 S.E.2d 615 (1978).

64. A local governmental body enjoys an initial presumption that its zoning decisions are valid. *Dekalb County v. Flynn*, 243 Ga. 679, 680 (256 SE2d 362) (1979). However, this presumption may be overcome by the plaintiff showing, with clear and convincing evidence, that the zoning is significantly detrimental to him and is insubstantially related to the public health, safety, morality, and welfare. *DeKalb County v. Flynn*, supra; *Guhl v. M.E.M. Corp.*, 242 Ga. 354, 355 (249 SE2d 42) (1978). If the property owner carries this burden then the city must come forward with evidence justifying the zoning, i.e., it must show the zoning is reasonably related to the public health, safety, morality, or general welfare. DeKalb County v. Flynn, supra p. 680; Kippar Corp. v. Griswell, 246 Ga. 539, 540 (240 SE2d 272) (1980).

DeKalb County v. Graham, 251 Ga. 423, 425, 306 S.E.2d 270, 271-72 (1983) (citing Flournoy v. City of Brunswick, 248 Ga. 573, 285 S.E.2d 16 (1983)).

In three of its six recent opinions, the Georgia Supreme Court found a shifted burden and, ultimately, a taking, although each trial court had held for the local governments. Sellars v. Cherokee County, 254 Ga. 496, 330 S.E.2d 882 (1986); Rea v. City of Cordele, 255 Ga. 392, 339 S.E.2d 223 (1986) (Presiding Justice Marshall and Justice Weltner dissented in both cases; Haygood v. City of Doraville, No. 43383 (Ga. Sup. Ct. Nov. 26, 1986) (three Justices dissented to each of the reversals).

65. Moon v. Cobb County, No. 43570 (Ga. Sup. Ct. Dec. 3, 1986) (Smith, J., dissenting); DeKalb County v. Bremby, 252 Ga. 510, 314 S.E.2d 900 (1984); Hall County Board of Comm'rs v. Agri-Bio Corp., 249 Ga. 112, 288 S.E.2d 206 (1982); Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981); *Cf.* City of Atlanta v. McLennan, 240 Ga. 407, 226 S.E. 2d 732 (1977) (city had no effective forum in which developer could raise constitutional issue).

66. Dougherty County v. Webb, No. 43768 (Ga. Sup. Ct. Dec. 3, 1986); City of Atlanta v. Wansley Moving & Storage Co., 245 Ga. 794, 267 S.E.2d 234 (1980). *See also* City of Atlanta v. International Soc'y for Krishna Consciousness, 240 Ga. 96, 97, 239 S.E.2d 515, 516 (1977). "The people's right to litigate with government bodies should not be decided on technicalities . . . ." *Id.* at 97, 239 S.E.2d at 515.

scope of challenges to constitutionality of zoning to include zones more intensive than the existing zoning to avoid repetitive litigation,[67] and (6) a reasonable opportunity for local government to rezone the property constitutionally after a finding of unconstitutionality.[68]

Most wins by local governments on the merits have resulted from the failure of developers to meet their initial burden of proof of significant detriment[69] and insubstantial relationship to public welfare, and not because the government mounted an onslaught of proof.[70] Only rarely have local governments mounted an effective defense on the merits to a developer who has met his initial burden of proof.[71] Developers have benefited from the weakness of lo-

---

67. DeKalb County v. Post Properties, Inc., 245 Ga. 214, 263 S.E.2d 905 (1980); City of Atlanta v. McLennan, 237 Ga. 25, 226 S.E.2d 732. *Compare* Mayor of Hinesville v. Gastin, 178 Ga. App. 776, 344 S.E.2d 744 (1986) (trial court remanded to local officials for reconsideration: held not "final judgement" for appeal).

68. City of Atlanta v. McLennan, 237 Ga. at 27, 226 S.E.2d at 734; *see also* Hunt v. McCollum, 214 Ga. 809, 108 S.E.2d 275.

69. *See, e.g.,* Gradous v. Board of Comm'rs, ___ Ga. ___, 349 S.E.2d 707 (1986) (only evidence of impact of zoning on land value was affidavit of developer with contract of sale contingent on rezoning); Warren v. City of Marietta, 249 Ga. 91, 287 S.E.2d 539 (1982) (landowner's desire to park commercial vehicle in a residential district thwarted); Ohoopee Land Dev. Corp. v. Mayor of Wrightsville, 248 Ga. 96, 281 S.E.2d 529 (1981) (no evidence that property was unsuited for existing zoning); Pope v. City of Atlanta, 242 Ga. 331, 249 S.E.2d 16 (1978) (plaintiff's claim of detriment based on prohibition against adding a tennis court to her developed residential lot when the proposed court would be located on the banks of the Chattahoochee River, an area regulated by the Metropolitan River Protection Act).

70. *See, e.g.,* Flournoy v. City of Brunswick, 248 Ga. 573, 285 S.E.2d 16 (1981); Koppar Corp. v. Griswell, 246 Ga. 539, 272 S.E.2d 272 (1980) (in all three cases, the local government prevailed while introducing no evidence to justify its zoning); Avera v. City of Brunswick, 242 Ga. 73, 247 S.E.2d 868 (1978).

In high-growth counties in the Atlanta metropolitan area, county attorneys reported mixed results in 1985 zoning litigation. Cobb County's attorney reported winning "five of his six cases" while Fulton County's attorney lost "three or four of his seven." Moss, *Land Use Wars Pit Homeowners v. Developers*, Atlanta J. & Const., Sept. 15, 1985, at 15A, col. 2.

71. *See, e.g.,* DeKalb County v. Chamblee Dunwoody Hotel Partnership, 248 Ga. 186, 281 S.E.2d 525 (1981) (Atlanta's Perimeter Highway accepted as a reasonable dividing line between zones despite developer evidence of financial harm—$30,000/acre as zoned versus $126,000/acre as proposed). Later the property was rezoned by the county to the satisfaction of the developer and the distress of the neighbors in Burry v. DeKalb County, 165 Ga. App. 246, 299 S.E.2d 602 (1983). *See also* DeKalb County v. Graham, 251 Ga. 423, 306 S.E.2d 270 (1983) (county prevailed, countering developer's evidence with expert appraisal testimony that the current zoning did not harm the developer and that the developer's proposal would harm neighboring properties).

In at least one case against Fulton County, the county assembled a case so daunting that no appeal was filed after the county's victory at trial. The county's vigorous defense has not been duplicated for two understandable reasons: the defense cost the

cal government evidence in support of existing zoning[72] and the sometimes erratic applications of the *Barrett* balancing test.[73]

Barrett's application to zoning in the Atlanta metropolitan area has undoubtedly facilitated the emergence of suburban counties as business centers in their own right, rather than mere bedroom

---

county more than $100,000 and the homeowners in Aruba Circle whose interest the county defended have since sold out as a group to a commercial developer. Interview with Tom Roberts, Planning Consultant (testified for the county in the case); *see also Anatomy of a Rezone*, Atlanta J. & Const., Sept. 15, 1985, at 14A, col. 1.

Discussions in the Subcommittee on Governmental Reorganization of the 1980 Committee to Revise Article IX of the Constitution of Georgia indicated that Fulton County had spent "close to a half million dollars just in litigation" on zoning in the preceding five or six years. STATE OF GEORGIA SELECT COMMITTEE ON CONSTITUTIONAL REVISION, TRANSCRIPT OF MEETINGS, at 11 (Subcommittee, Sept. 3, 1980).

72. In *Barrett*, Cobb County's own planning director testified on behalf of the developer. 235 Ga. at 263-64, 219 S.E.2d at 401. *See also* Rea v. City of Cordele, 255 Ga. 392, 339 S.E.2d 223 (1986) (chairman and two members of five-member city commission testified that there was "no compelling reason" to maintain the challenged zone). Sellars v. Cherokee County, 254 Ga. 496, 330 S.E.2d 882 (1985) (197 neighboring property owners petitioned in support of rezone to commercial, county's only witness—the commissioner—had no opinion to dispute expert testimony of no traffic problems or appraisal testimony that rezoning would increase value from $10,000/acre to $50,000/acre, and county's "domino effect" theory to oppose rezoning found insufficient because not based on the "character of the land in question"); Brown v. Dougherty County, 250 Ga. 658, 300 S.E.2d 509 (1983) (only the testimony of two neighbors and the depositions of county commissioners were offered to counter "extensive expert testimony"); Cobb County v. Shapiro, 251 Ga. 55, 303 S.E.2d 10 (1983) (after developer produced several experts to support his claim, county's planner admitted on cross examination that plaintiff's property could not be used as zoned); Jackson v. Goodman, 247 Ga. 683, 279 S.E.2d 438 (1981) (city plan showed much higher density than existing zoning); Bobo v. Cherokee County, 248 Ga. 554, 285 S.E.2d 177 (1981) (only testimony of one county commissioner supporting existing zoning to counter several expert witnesses for developer that land was unusable as zoned); East Lands, Inc. v. Floyd County, 244 Ga. 761, 262 S.E.2d 51 (1979) (county lacked plan of development to buttress its zoning).

73. In DeKalb County v. Flynn, 243 Ga. 679, 256 S.E.2d 362 (1979), the court responded to county concern about traffic loads by placing the burden of response to traffic problems on the local government: "the county has the duty and obligation to work with property owners to allow them the highest and best use of their property, by considering on its own motion ways in which the county's objections to a proposed development could be eased by county action." *Id.* at 681, 256 S.E.2d at 364. Other cases have taken a more supportive view of local governments in dealing with traffic problems. *See, e.g.*, Hubert Realty Co. v. Cobb County Board of Comm'rs, 245 Ga. 236, 264 S.E.2d 179 (1980) (residential zoning sustained after county planner's testimony that traffic in the area was "barely controllable" with existing residential zoning); Westbrook v. Board of Adjustment, 245 Ga. 15, 262 S.E.2d 785 (1980) (developer's proposed convenience store found to be a potential traffic hazard). In DeKalb County v. Albritton Properties, 256 Ga. 103, 344 S.E.2d 653 (1986), City of Roswell v. Heavy Machines Co., Inc., No. 43817 (Ga. Sup. Ct. Nov. 13, 1986), and Haygood v. City of Doraville, No. 43383 (Ga. Sup. Ct. Nov. 26, 1986) county expert testimony on traffic was insuffient to save residential zoning from a taking challenge.

communities for the Atlanta central business district; many allegations of taking involve challenges to residential zoning by developers of office and commercial space.[74] The apparent decline in reported *Barrett* cases can be attributed to several factors:

1. Case law has evolved to cover many of the open issues which once required appellate litigation.[75]

2. County commissioners may resist ever-larger investments in the costs of litigation and may be intimidated by the potential for personal and county liability in damage actions.[76]

3. County commissioners feel constrained to approve development which generates large amounts of tax revenue which might otherwise go to adjoining counties.[77]

---

74. *See* Walker, *The Trouble(!) with Steady Growth*, Atlanta J. & Const., June 16, 1985, at 2E, col. 1, *quoting* participants in a conference on "New Forms of Metropolitan Growth."

One suburban growth area, the Perimeter Center, will have more office and commercial space than the central business district of Atlanta when all approved development is constructed. The Perimeter Center area has been the focus of several *Barrett*-type cases. *See, e.g.*, DeKalb County v. Chamblee Dunwoody Hotel Partnership, 248 Ga. 186, 281 S.E.2d 525 (1981); DeKalb County v. Post Properties, Inc., 245 Ga. 214, 263 S.E.2d 905 (1980).

75. *See supra* notes 61-68 and accompanying text.

76. In major cases, developers' attorneys are unlikely to repeat errors that handed governments their earlier, easy victories. *See, e.g., supra* note 65 and accompanying text (cases on exhaustion of remedies); Brewer v. Board of Zoning Adjustment, 170 Ga. App. 351, 317 S.E.2d 327 (1984) (timely appeals).

DeKalb County's legal fees for 1984-85 were up 97% over 1980-81; Gwinnett County, the fastest growing suburban county in the nation, had a 129.5% increase in legal fees over the same period. Roughton, *Legal Expenses Skyrocketing for Taxpayers in Most Metro Counties*, Atlanta J. & Const., Oct. 6, 1985, at 1B, col. 3. Clayton County commissioners are being sued for $1,000,000 each in one zoning suit. *Id.* at 4B, col. 1. A developer is seeking $52,000,000 in damages against DeKalb County. Moss, *supra* note 70.

77. In the Perimeter Center area, particularly, DeKalb and Fulton Counties are participants in a classic "prisoners' dilemma." If Fulton turns down intensive development while adjoining DeKalb approves it, Fulton will have essentially the same traffic problems that would have followed approval without the benefit of the tax revenue; similarly, DeKalb would lose out if it turns down development while Fulton approves. *See, e.g.*, Salter, *The Anatomy of a Big Land Deal*, Atlanta J. & Const., Oct. 17, 1983, at 1C, col. 2.

There is no regional government, regional tax base sharing, or similar mechanism to extricate the counties from their pact of mutually assured destruction. The State Transportation Commissioner has warned that, in the Perimeter Center area:

> Even if the interchange movements would not gridlock (which they will), I-285 itself cannot handle traffic of the magnitude that is being assigned to it . . . . It, in my opinion, would be foolhardy to make zoning decisions of this magnitude based upon an assumption that the North Atlanta Parkway and the [Perimeter Park Loop] will be constructed . . . .

HeinOnline -- 2 Ga. St. U. L. Rev. 111 1985-1986

4. County commissioners may be reluctant to offend the real estate industry which is the largest single source of campaign contributions in local elections.[78]

5. Some inducements to vote favorably on zoning cases move past campaign contributions to outright bribes.[79]

6. Residential neighborhoods in the hottest development areas have decided to stop fighting development and sell out to developers.[80]

King, *Moreland: Lake Hearn Plan Will Cause Too Much Traffic*, Atlanta J. & Const., June 22, 1985, at 1A, col. 2, *quoting* Transportation Commissioner Tom Moreland. *See* discussion of traffic and inter-county interactions in DeKalb County v. Albritton Properties, 256 Ga. 103, 344 S.E.2d 653 (1986).

78. The influence of campaign contributions on voting patterns has become a focus of official study (Hopkins, *Ethics Board Issues Campaign Donations Study*, Atlanta Const., June 13, 1985, at 30A, col. 1) and unofficial study (neighborhood organizations in both DeKalb and Fulton Counties are maintaining close records of contributions and votes on zoning).

The 1986 General Assembly enacted House Bill 618, which requires local government officials to disclose any ownership interests in real property which may be affected by zoning decisions for which they are authorized to vote. O.C.G.A. § 36-67A-2 (Supp. 1986).

79. *See, e.g.*, Page v. State, 159 Ga. App. 344, 283 S.E.2d 310 (1981).

80. By mid-March of 1985, 18 different neighborhoods in the Atlanta metropolitan area were engaged in some form of attempted sellout. The financial rewards can be considerable; homeowners in the Pine Grove Avenue section of DeKalb County were offered more than double the price that separate houses would have brought. Harris, *Neighborly Creed: Unite and Sell Out*, Atlanta J. & Const., Mar. 31, 1985, at 1A, col. 2; *see* Pendered, *Lake Hearn: The Great Debate*, Atlanta J. & Const., DeKalb Extra, June 20, 1985, at 1B, col. 2.

Neighborhoods abutting accomplished sellouts are concerned that office space demand will be exhausted before the next generation of sellouts can occur.

> The land that already has been assembled and rezoned is enough to last developers for a long time. . . . [Other neighborhoods] won't be able to sell because the major hitters are already there. And after developers see some problems the competition is having with leasing, they're going to say, "Whoa, we need to slow down."

Hal Barry, of Portman Barry Investors, Inc., *quoted in* Pendered, *Lake Hearn Opponents Disagree on Whether Rezoning Would Invite More Development*, Atlanta J. & Const., DeKalb Extra, June 20, 1985, at 8A, col. 3.

The DeKalb County Commission has rejected rezoning for two major neighborhood sellout proposals in the Perimeter Center area. Opposition by the Commissioner of the State Department of Transportation was seen as decisive. Salter, *Many Want Things to Slow Down*, Atlanta J. & Const., Sept. 15, 1985, at 7M, col. 1; Cowles, *A 2nd Sellout in DeKalb is Rejected*, Atlanta Const., Sept. 25, 1985, at 1F, col. 1. Other major rezonings in the Perimeter Center area had involved primarily vacant land whose vacancy buttressed claims under the fifth *Guhl* standard that the land was unsuited for the current zoning. *See supra* note 62. In contrast, the two neighborhood buyouts involved developed residential areas where existing homes have continued to be marketable as residences. *See generally* Research Atlanta, *Neighborhood Buyouts: Balancing Conflicting Interests* (1986).

7. The state supreme court may be changing its focus in zoning decisions and relegating the taking issue to trial judges in the same way that the Illinois Supreme Court has relegated the issue to intermediate appellate courts.[81]

8. State-imposed moratoria on development in high-growth counties with inadequate sewage systems and increasing water shortages may moot local zoning decisions with State environmental regulations.[82]

Other Substantive Issues in Developers' Cases

In the definition of "vested rights" under zoning ordinances, the addition of an economic element has reduced developers' rights in zoning. Under older Georgia cases, a landowner received a vested right to develop as zoned without evidence of reliance.[83] In 1981, Georgia again adopted an Illinois rule in requiring "substantial change in position by expenditures" in reliance on the existing zoning before a landowner acquired a vested right.[84]

The importance of economic evidence in successful *Barrett* cases is counterpointed by the relative disinterest the Georgia Supreme Court has shown in other substantive due process issues raised by

---

DeKalb County's attempt to sustain residential zoning against neigborhood sellouts in the Lake Hearn subdivision, DeKalb County v. Albritton Properties, 256 Ga. 103, 344 S.E.2d 653 (1986) and the City of Doraville's similar defense of residential zoning against a partial sellout of the Carver Hills neighborhood, Haygood v. City of Doraville, No. 43383 (Ga. Sup. Ct. Nov. 26, 1986), have been found takings by the Georgia Supreme Court.

81. While the Georgia Supreme Court issued only seven zoning decisions in the first ten months of 1985, lower court dockets in the Atlanta metropolitan area were "swollen," with Cobb County alone facing "nearly twice the number of lawsuits by disgruntled landowners this year as last." Moss, *supra* note 70.

82. Limited moratoria have been imposed in three high-growth counties. More are threatened. Walker, *Can Atlanta Maintain Quality Growth?*, Atlanta J. & Const., Sept. 15, 1985, at 8M, col. 2; Saporta, *Atlanta's Development Problems Grow on Rising Tide of Water Woes*, Atlanta J. & Const., Sept. 15, 1985, at 4M, col. 1.

83. *See, e.g.*, Clark v. International Horizons, Inc., 243 Ga. 63, 252 S.E.2d 488 (1979).

84. Barker v. County of Forsyth, 248 Ga. 73, 281 S.E.2d 549 (1981) (citing Illinois precedent); *see* Bailey Investment Company v. Augusta-Richmond County Board of Zoning Appeals, 256 Ga. 176, 345 S.E.2d 596 (1986) (finding denial of equal protection in granting amended setback only to property zoned multi-family after effective date of amendment while denying new setback to previously zoned multi-family); WMM Properties v. Cobb County, 255 Ga. 436, 339 S.E.2d 252 (1986); Cannon v. Clayton County, 255 Ga. 63, 335 S.E.2d 294 (1985) (county could not enforce moratorium on issuance of building permits for mobile homes in violation of landowner's vested property rights in land as zoned); Cobb County v. Peavy, 248 Ga. 870, 286 S.E.2d 732 (1982) (purchase of business license for day care center did not give property owner vested rights in existing zoning laws).

developers. Most astonishing among cases raising non-economic issues is *Ohoopee Land Development Corp. v. Mayor of Wrightsville.*[85] The developer in that case made some attempt to demonstrate economic damage from regulation; the posture of the case made such evidence tenuous if a request to rezone from commercial to multi-family residential was made less than one year after the developer himself had requested the commercial zoning of the property from residential. The City Council of Wrightsville denied the residential rezoning after citizens opposed federally subsidized housing units because "no one could assure them that some non-whites would not occupy the housing units."[86]

Federal courts have found zoning which thwarts public housing on racial grounds unconstitutional on records where Georgia local officials more successfully concealed their motives.[87] In Georgia's Supreme Court "the possible race of occupants of residentially zoned properties is not among" the "critical interests" and "relevant lines of inquiry" in rezoning cases.[88] The court found a decision "based . . . entirely upon improper racial considerations" unconstitutional because "the developer failed entirely to rebut the inference that [the] parcel was . . . readily marketable."[89]

Landowners have also challenged the propriety of land use regulations based on aesthetic considerations. The Georgia courts have accepted aesthetically motivated regulations where the economic stakes of the regulated use were not high.[90] That acceptance of aes-

85. 248 Ga. 96, 281 S.E.2d 529 (1981).

86. *Id.* at 96, 281 S.E.2d at 530.

87. Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972). Fulton County officials used the euphemism "nice luxury apartments" to describe the development they desired instead of public housing. 332 F. Supp. at 389-90.

88. 248 Ga. at 97, 281 S.E.2d at 531.

89. *Id.* Georgia has recognized a type of discrimination in application of zoning rules, but not a racially motivated form. Shoemake v. Woodland Equities, 252 Ga. 389, 313 S.E.2d 689 (1984) (environmental review ordinance and establishment of a separate "mining operations district" found directed at particular quarry operation). Hogs have fared somewhat better than minorities in challenges to the constitutionality of zoning. In Avant v. Douglas County, 253 Ga. 225, 319 S.E.2d 442 (1984), a three-animal per tract limit without regard to the size of the tract in a single family zone was found constitutionally unreasonable under the *Barrett* standards. The landowners, who had raised as many as 70 hogs on their 21-acre tract, needed no economic evidence of harm to trigger the application of *Barrett*.

90. *See, e.g.*, City of Smyrna v. Parks, 240 Ga. 699, 242 S.E.2d 73 (1978) (prohibition of chain link fences in front yards upheld). In *Parks*, the ordinance permitted other decorative fences so that the basic functional need for fencing was still served. The City defended on the basis of "safety hazards" from chain link fences, but the court found "the ordinance would not be an unwarranted exercise of police power based on

thetic goals does not extend to situations in which serious economic impact results. "The public interest in aesthetics . . . standing alone, is simply 'too vague and thus weighs too lightly in the balance' to offset . . . substantial injury."[91]

Another non-economic constitutional issue decided by the Georgia Supreme Court in recent years is the equal protection challenge to a zoning ordinance's definition of a "family". In a case challenging restrictions on group homes for retarded citizens, the right of association of persons not related by blood piqued no more interest in the Georgia Supreme Court[92] than it had in the United States Supreme Court.[93] Other courts have found state law approaches which are more supportive of group homes excluded by a zoning definition of "family".[94]

---

aesthetics alone." *Id.* at 705, 242 S.E.2d at 77. *See also* Corey Outdoor Advertising Inc. v. Board of Zoning Adjustment of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (1985), *appeal dismissed*, 54 U.S.L.W. 3194 (U.S. Oct. 8, 1985) (enjoining billboard constructed in violation of city restrictions against billboards in proximity to designated historic sites); Dep't of Transp. v. Shiflett, 251 Ga. 873, 310 S.E.2d 509 (1984) (state billboard restrictions upheld against claimed infringement of freedom of expression); Warren v. City of Marietta, 249 Ga. 205, 288 S.E.2d 562 (1982) (prohibition of parking school bus in a residential district upheld); Gouge v. City of Snellville, 249 Ga. 91, 287 S.E.2d 539 (1982) (prohibition of satellite dish in a residential front yard upheld); *but see* Dills v. Cobb County, Georgia, 593 F. Supp. 170 (N.D. Ga. 1984), *aff'd*, 775 F.2d 1473 (11th Cir. 1985) (invalidating zoning restriction on portable sign as impermissibly vague and overbroad). *Cf.* Pope v. City of Atlanta, 242 Ga. 331, 249 S.E.2d 16 (expressing strong support for environmental values).

91. Brown v. Dougherty County, 250 Ga. at 660, 300 S.E.2d at 509 (quoting Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399).

92. Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n, 252 Ga. 484, 314 S.E.2d 218 (1984). The case continued the astonishing record of the Macon-Bibb County Planning and Zoning Commission which has never lost a reported zoning appeal on the merits. *See, e.g.*, Martin-Marietta Corp. v. Macon-Bibb County Planning and Zoning Commission, 235 Ga. 689, 221 S.E.2d 401 (1975) (the first case won by a local government under *Barrett*). The deference to the joint commission appears to come from its consistent compliance with its planning and from a greater trust in the impartiality of the commission as contrasted with local elected bodies.

93. *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (no fundamental right raised by claim of students who wished to share housing) *with* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (fundamental right of family infringed by criminal prosecution of grandmother for violating local regulation by permitting her son and two grandchildren to live with her).

Belle Terre was the only authority cited by the Georgia Supreme Court on the issue of equal protection. *Macon Ass'n for Retarded Citizens*, 252 Ga. at 487, 314 S.E.2d at 221.

94. *See, e.g.*, City of White Plains v. Ferraioli, 34 N.Y.2d 300, 357 N.Y. Supp.2d 449, 313 N.E.2d 756 (1974) and cases collected in Open Door Alcoholism Program v. Board of Adjustment of the City, 200 N.J. Super. 191, 199, 491 A.2d 17, 21-22 (1985) (*Belle Terre*'s transient students distinguished from group homes designed to simulate family

HeinOnline -- 2 Ga. St. U. L. Rev. 115 1985-1986

The Rise of Procedure in Neighbors' Cases

As Chart 1 demonstrated, the non-taking cases have continued in a steady flow even as *Barrett* cases have declined. The most significant aspect of these non-taking cases has been the re-establishment of neighbors' rights in zoning. The evolution of the law has occurred on two fronts: first, in the finding of standing for neighbors who wish to challenge zoning decisions and, second, in the generation of cognizable issues for neighbors with standing.

Standing

The Georgia Supreme Court's cases on neighbors' standing apply rules analogous to those of public nuisance. Although the government is the prime enforcer of the rules of public nuisance, citizens who suffer damages different in kind—not just degree—from the public at large may bring private suit against the nuisance.[95] Thus Georgia has developed a "special damages" test for neighbors' standing in zoning cases.

Until recently no neighbor had ever demonstrated "special damages" to the satisfaction of the Georgia Supreme Court.[96] Since 1983, the record of the Georgia Supreme Court on standing has changed markedly. The initial change widened standing in those cases where neighbors made allegations of fraud or corruption.[97] Further, the court has eased the application of its "special damages" test in other types of challenges by neighbors; recent cases

---

living situation); City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, 322 So. 2d 571 (Fla. Dist. Ct. App. 1975) (the court discussed several approaches including preemptive immunity from local zoning for group homes mandated by state law; however, it based its opinion on the "balancing test"). The dissenting opinion of Justice Gregory in *Macon Ass'n* relied on the preemption theory. 252 Ga. at 490, 314 S.E.2d at 223. In City of College Park v. Flynn, 248 Ga. 222, 282 S.E.2d 69 (1981), the Georgia Supreme Court had construed the word "dwelling" in a zoning ordinance to include a half-way house.

95. Four theories have been advanced [supporting the rights of adjoining landowners]: (1) that a zoning ordinance is similar to a third party beneficiary contract; (2) that the zoning ordinance is similar to a covenant running with the land; (3) that the cause of action is similar to a nuisance action; and (4) that a zoning ordinance creates rights in favor of individuals as well as public authorities which are enforceable in a civil suit.

Frankland v. City of Lake Oswego, 267 Or. 452, 474, 517 P.2d 1042, 1053 (1973).

96. Lindsey Creek Area Civic Ass'n v. Consolidated Gov't, 249 Ga. 488, 292 S.E.2d 61 (1981); Tate v. Stephens, 245 Ga. 519, 265 S.E.2d 811 (1980); *see, e.g.*, Brock v. Hall County, 239 Ga. 160, 236 S.E.2d 90 (1977).

97. Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984); Dunaway v. City of Marietta, 251 Ga. 727, 308 S.E.2d 823 (1983).

https://readingroom.law.gsu.edu/gsulr/vol2/iss2/37 HeinOnline -- 2 Ga. St. U. L. Rev. 116 1985-1986

have found standing on facts not notably different from those in earlier cases which denied standing.[98]

Chief Justice Hill in his concurring opinion in *DeKalb County v. Wapensky*[99] has suggested "that in practice a neighbor who can *see*, *hear*, or *smell* the proposed development, if its sight, sound, or odor be offensive, has standing under the *Brand v. Wilson* test."[100] Certainly, an adjacent owner, whose property touches the property to be developed has standing to object to its rezoning or the allowance of a variance.

Neighbors' Cases on the Merits

All of the successes achieved by neighbors in challenging rezonings since *Barrett* have come in challenges to procedures used by local government. Traditional claims that a rezoning is "arbitrary and capricious"[101] or "spot zoning"[102] have met an unreceptive

98. Moore v. Maloney, 253 Ga. 504, 321 S.E.2d 335 (1984) (special damages shown by adjoining property owner that development would create " 'visual intrusions on peace and privacy' "); DeKalb County v. Wapensky, 253 Ga. 47, 315 S.E.2d 873 (1984) (special damages shown by adjoining property owners that proposed zoning variance would decrease their property values because of the "noise, odor and visual intrusions on peace and privacy"); City of Marietta v. Traton Corp., 253 Ga. 64, 316 S.E.2d 461 (1984) (upheld trial court's finding of "special and substantial damages"); Brand v. Wilson, 252 Ga. 416, 314 S.E.2d 192 (1984) (special damages shown by adjoining property owner that property rezoning would reduce the value of their property by 15 to 20 percent).

Compare the appraiser testimony in support of "special damages" in *Brand*, 252 Ga. at 417, 314 S.E.2d 192, 194, with the expert testimony in an earlier case, Douglas County Resources, Inc. v. Daniel, 247 Ga. 785, 280 S.E.2d 734 (1981). The Georgia Court of Appeals anticipated the supreme court's new view of standing. Royal Atlanta Dev. Corp. v. Staffieri, 135 Ga. App. 528, 218 S.E.2d 250 (1975), *rev'd*, 236 Ga. 143, 223 S.E.2d 128 (1976); Burry v. DeKalb County, 165 Ga. App. 246, 299 S.E.2d 602 (1983).

99. 253 Ga. 47, 315 S.E.2d 873 (1984).

100. *Id.* at 50, 315 S.E.2d at 876 (1984). Until Justice Hill's views are adopted, neighbors must be careful to introduce proper expert evidence of "special damages." *See* Altman v. Quattlebaum, 253 Ga. 341, 320 S.E.2d 179 (1984) (neighbors had relied on an alleged covenant to show interest in rezoned property; the court found no enforceable covenant). Justice Hill's liberal criteria for neighbors' standing do not extend to neighbors' right to intervene in litigation. DeKalb County v. Post Properties, Inc., 245 Ga. 214, 263 S.E.2d 905 (1980).

101. City of Marietta v. Traton, 253 Ga. 64, 316 S.E.2d 461 (1984); Johnson v. DeKalb County, 241 Ga. 28, 243 S.E.2d 70 (1978) (various claims of neighbors dispatched in one paragraph opinion).

102. "[A]n epithet adopted by the courts to describe certain things they didn't like, 'spot zoning' was a label used to undercut the presumption in favor of suspect favors to small parcels in the form of legislative rezoning." N. WILLIAMS, 3 AMERICAN LAND PLANNING LAW § 27.01, at 560 (1974). Pre-*Vulcan Materials* cases used the label. *See* Morgan v. Thomas, 207 Ga. 660, 63 S.E.2d 659 (1951), Orr v. Hapeville Realty Inv., Inc., 211 Ga. 235, 240, 85 S.E.2d 20, 24 (1954), Neal v. City of Atlanta, 212 Ga. 687,

HeinOnline -- 2 Ga. St. U. L. Rev. 117 1985-1986

court. Georgia's due process standards for notice to neighbors of rezoning hearings are minimal,[103] but the judiciary has been vigorous in enforcing notice procedures specified by local ordinance.[104]

The vigilance shown in the notice cases has been extended to require compliance with other procedures required by local ordinances including requirements, such as: a twenty-four month cooling off period between rezoning applications,[105] the requirement of a site plan filed by an applicant for rezoning,[106] reference to specific standards for granting variances,[107] and the requirement of a finding that rezoning complied with the city comprehensive plan.[108]

688, 94 S.E.2d 867, 868 (1956) (described by Williams as "missing the point completely" by applying the label to a special permit. N. WILLIAMS, *supra* § 27.06 n.25). Only dissents, *e.g.*, Barrett v. Lamb & Assoc., 243 Ga. 567, 570, 255 S.E.2d 61, 62 (1979), and concurrences, *e.g.*, Wyman v. Popham, 252 Ga. 247, 250, 312 S.E.2d 795, 797 (1984), have used the label favorably, while majority opinions have rejected it. *See, e.g.*, Dunaway v. City of Marietta, 251 Ga. 727, 729, 308 S.E.2d 823, 824 (1983).

103. " '[N]otice by publication of a rezoning hearing to be held by a governing authority of a county is proper and adequate insofar as the requirements of procedural due process and equal protection are concerned.' " DeKalb County v. Pine Hills County Civic Club, 254 Ga. 20, 326 S.E.2d 214 (1985) (quoting F.P. Plaza, Inc. v. Waite, 230 Ga. 161, 163-64, 196 S.E.2d 141, 144 (1973)) (neither constitution nor county ordinance required mailed notice to abutting property owners in adjoining county).

104. Decisions invalidating rezonings for improper notice include: Yost v. Fulton County, 256 Ga. 92, 348 S.E.2d 638 (1986); Golden v. White, 253 Ga. 111, 316 S.E.2d 466 (1984) (rezoning void for lack of notice although not challenged until 13 years after city decision). South Jonesboro Civic Ass'n v. Thornton, 248 Ga. 65, 281 S.E.2d 421 (1981). Decisions upholding rezonings which complied with notice provisions include: Coleman v. Johnson, 253 Ga. 771, 325 S.E.2d 382 (1985); Powers Ferry Civic Ass'n v. Life Ins. of Ga., 250 Ga. 419, 297 S.E.2d 477 (1982); *see also* Harms v. Adams, 238 Ga. 186, 232 S.E.2d 61 (1977) (reporter claimed violations of state Sunshine Law by exclusion from hearings; the court concluded that the reporter could have attended meetings if he had been able to find them and indicated that proper issue would have been lack of notice which reporter did not allege).

105. Heller v. Board of Comm'rs, 238 Ga. 501, 233 S.E.2d 761 (1977). *Compare* Newman v. Smith, 217 Ga. 465, 123 S.E.2d 305 (1961) *with* Seaboard System R.R. v. Bankester, 254 Ga. 455, 459, 330 S.E.2d 700, 704 (1985) (24-month moratorium on special use permit applications found waivable by city council since its purpose was to allow council "to control its agenda").

106. Brand v. Wilson, 252 Ga. 416, 314 S.E.2d 192 (1984).

107. DeKalb County v. Wapensky, 253 Ga. 47, 315 S.E.2d 873 (1984).

108. Moore v. Maloney, 253 Ga. 504, 321 S.E.2d 335 (1984). In *Moore*, dealing with Atlanta City Code § 16-27.011 on comprehensive planning, the Georgia Supreme Court held "that the trial court erred in not returning the case to the city council 'to be decided in accordance with applicable requirements of law' " because "the city council clearly ignored the requirements of the city zoning ordinance regarding comprehensive development plans." 253 Ga. at 507, 321 S.E.2d at 338 (quoting Brand v. Wilson, 252 Ga. 416, 314 S.E.2d 192). *But see* Seaboard System R.R., 254 Ga. 455, 330 S.E.2d 305. In *Seaboard*, "[t]he trial court found that 'the procedural requirements of § 16-27.011

Even in those cases where no particular local ordinance requires that decisions be made without fraud or corruption, the Georgia Supreme Court has insisted that zoning decisions be free of such taint.[109] Because "fraud is often subtle and difficult of proof, and [because] the integrity of the process of public deliberation is of the utmost importance to the public weal," the court has determined that a preponderance of the evidence is the appropriate standard of proof for allegations of fraud or corruption.[110] Although most appellate zoning decisions have not reached an actual fact finding of fraud or corruption, two cases were used by analogy to invalidate the City of Atlanta's transfer of park land to the State Department of Transportation for highway construction when the City Council President owned fifty-one percent of the company which held a contract for the highway project.[111] In the only recent zoning case reaching the merits of a claim of fraud, the

---

are mandatory' "; the supreme court disagreed with the trial court, stating that the code merely "states the policy of the City Council which is to guide the Council in making its decision." 254 Ga. at 460, 330 S.E.2d at 705. By setting up two parallel lines of cases on the same code section, a habit which makes the use of Shephard's Citations in Georgia an exercise comparable to training a cage full of invisible tigers, the Georgia Supreme Court continued the whimsical "rule of law" which inspired Norman Williams to comment that "Georgia zoning law has by far the highest percentage of nonsense appearing in any state." N. WILLIAMS, *supra* note 1, at § 6.25. The Georgia Supreme Court manages the geometric conundrum of zig-zagging, tracing parallel lines, and going in circles—all at the same time.

In Johnson v. Glenn, 246 Ga. 685, 273 S.E.2d 1 (1980), the court considered neighbors' claim of noncompliance with a plan, found compliance with the plan as amended, and then discounted the relevance of compliance in its holding.

109. Dunaway v. City of Marietta, 251 Ga. 727, 308 S.E.2d 823 (1983). In *Dunaway*, the plaintiff alleged the existence of a conflict of interest where the chairman of the city planning commission was a vice president of the corporation requesting the rezoning application. The chairman presided over one of two hearings on the rezoning but did not vote; the plaintiff alleged that the chairman had contacted city council members to lobby for the rezoning. *Id.*

See also Department of Transp. v. Brooks, 254 Ga. 303, 328 S.E.2d 705 (1985). "[T]he legal effect of this conflict [of interest] must be determined by laws of statewide application which cannot, of course, be inhibited by a city ordinance." *Id.* at 315, 328 S.E.2d at 715. In *Brooks*, dealing with a transfer of land by the City of Atlanta, the court found such "laws of statewide application . . . [b]y the common law and independently of statute." *Id.*

O.C.G.A § 36-67A-3 (Supp. 1986) requires applicants for rezoning to disclose any campaign contributions or gifts of $250 or more made to any local official authorized to vote on their rezoning request.

110. Wyman v. Popham, 252 Ga. 247, 248, 312 S.E.2d 795, 796 (1984). Early cases had suggested, if not held, that clear and convincing evidence was needed for such allegations. Lancaster v. Allen, 242 Ga. 5, 6, 247 S.E.2d 746, 747 (1978); Cross v. Hall County, 238 Ga. 709, 711, 235 S.E.2d 379, 382 (1977).

111. *Brooks*, 254 Ga. 303, 328 S.E.2d 705.

HeinOnline -- 2 Ga. St. U. L. Rev. 119 1985-1986

supreme court overturned a jury verdict of fraud.[112]

The development of case law requiring strict compliance with rules established by local ordinance and by common law standards of good policy has raised the standard of conduct for local government officials and suggests a decision model which is unlike that found in higher legislative bodies.[113] The model, called "quasi-judicial" in other jurisdictions,[114] contains elements which are threads in Georgia's recent cases. The quasi-judicial approach makes its record for appeal before local government bodies, with no trial *de novo* before the courts. Such a position has been urged before the Georgia Supreme Court, which found that the "argument has merit" while directing the issue to the General Assembly.[115] For such local hearings, courts using the quasi-judicial label demand procedural safeguards[116] comparable to those urged by the Georgia Supreme Court for final hearings.[117]

---

112. Smith v. Folds, 256 Ga. 61, 62-63, 344 S.E.2d 226, 227 (1986) (neighbors' claim that developer misrepresented width of access road and other traffic conditions; no evidence that developer knew the statements were false or that the statements were made with intent to deceive).

113. Georgia's willingness to accept customized conditions for "legislative" rezoning, *see, e.g.*, Warshaw v. City of Atlanta, 250 Ga. 535, 299 S.E.2d 552 (1983), is not in keeping with the rigid view of a legislative model. Under the rigid view, such conditions constitute improper "contract zoning." N. WILLIAMS, *supra* note 1, at §§ 29.01—29.02.

114. Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976); Leonard v. City of Bothell, 87 Wash. 2d 847, 557 P.2d 1306 (1976); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Fasano v. Board of Comm'rs, 264 Or. 574, 507 P.2d 23 (1973). *See generally* Bross, *Circling the Squares of Euclidean Zoning*, 6 ENVTL. L. 97 (1975).

115. Mayor of Savannah v. Rauers, 253 Ga. 675, 324 S.E.2d 173 (1985); *see also* International Funeral Services, Inc. v. DeKalb County, 244 Ga. 707, 261 S.E.2d 625 (1979). Appeal on the record has been proposed in drafts of the Georgia Zoning Procedures Act introduced in the 1984 and 1985 sessions of the General Assembly. The version of House Bill 51 passed in the 1985 Session does not provide for appeal on the record. A bill setting forth detailed procedural safeguards for local government hearings was introduced without passing in the 1986 Session. A recent study has recommended due process requirements for public hearings in local zoning. Research Atlanta, *Neighborhood Buyouts: Balancing Conflicting Interests*, at iv, 48-50, 73-75 (1986).

116. Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.

Fasano v. Board of Comm'rs, 264 Or. at 574, 507 P.2d at 30 (1973) (citing Comment, Zoning Amendment—The Product of Judicial or Quasi-Judicial Action, 33 Ohio St. L.J. 130, 143 (1972)).

117. "If certiorari were applicable to zoning and variance decisions, it would be nec-

The Georgia Supreme Court may not adopt the quasi-judicial model,[118] but it appears that the General Assembly and the court are moving in that direction whether the label is used or not.

State Constitutional Revisions and Legislative Enactments

In 1976, to prepare the way to adopt a new constitution one article at a time, the General Assembly passed, and the people adopted, what was largely an editorial revision of the 1945 Georgia Constitution. On the question of planning and zoning, the revision was not purely editorial because article III of the 1945 document was in direct conflict with the 1966 and 1972 grants of home rule power to counties and cities.[119] The Constitutional Revision Committee and the General Assembly had to choose between the two approaches. The subcommittee that studied the issue "elected to substantively change the constitution by deleting the three references to planning and zoning, and in lieu thereof, adopt[ed] a planning and zoning provision which [was] basically the same as article III."[120] The recommendation rolled the constitutional clock back to 1945; but, in the end, the recommendation did not prevail. The provision which finally passed followed the self-executing provision of the home rule amendments. It said: "The General Assembly shall not, in any manner, regulate, restrict, or limit the power and authority of any county, municipality, or any combination thereof,

---

essary for local authorities to have proceedings recorded and transcribed." *International Funeral Services, Inc.*, 244 Ga. at 709 n.3, 261 S.E.2d at 625 n.3. "[W]ere we to adopt [appeal on the record], zoning authorities throughout the state would be required to allow cross-examination of witnesses and would have to record the testimony and have it transcribed." *Mayor of Savannah v. Rauers*, 253 Ga. at 675, 324 S.E.2d at 173 (1985). The increased procedural detail may combine with heavy work loads to force delegation of the hearing function to hearing examiners or similar functionaries. See Secrest, *Cobb Shifts Zoning Schedule to Ease Load*, Atlanta Const., June 13, 1985, at 36A, col. 1., quoting one commissioner who "gets headaches from the long hours of public meetings, feels like a referee battered by antagonists and is losing business from his sewer and water pipe construction work."

118. The court in Olley Valley Estates, Inc. v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974), refused to apply the label "quasi-judicial" to a site-specific map amendment, while recognizing the "continued viability" of the label for special use permits. *Id.* at 781-82, 208 S.E.2d at 803. The court did not allow the label chosen ("the function in question, if it must be labeled, is quasi-legislative") to preclude inquiry into the bad faith of a county commissioner who voted on the rezoning. *Id.* Courts following the ultimate implications of the "quasi-legislative" label have refused to review zoning amendments when elected officials have been bribed. *See, e.g.*, Schauer v. City of Miami Beach, 112 So. 2d 838 (1959).

119. *See supra* notes 43-46 and accompanying text.

120. Memorandum from Harvey Findley, Deputy Legislative Counsel, to Representative Wayne Snow, House Dist. No. 1 (Oct. 23, 1975).

to plan and zone as herein defined."[121]

The same issue was debated at length during the process leading to the 1983 Constitution. During one of the early subcommittee meetings of the Constitutional Revision Committee, there was support for a return to the original approach of the 1945 Constitution.[122] What emerged as a recommendation of the Legislative Overview Committee prior to the call for a special legislative session was a provision that would have allowed the General Assembly to "enact general laws establishing procedures and conditions for the exercise of the power of planning and zoning by local governments."[123] The Chairman of the Article IX Committee assured committee members that this language was sufficiently broad to allow the General Assembly to require that zoning decisions conform to a previously adopted plan. This appeared to be the committee's intent.[124]

During the special session, the word "conditions" was removed from the provision leaving the General Assembly only power to regulate the procedures that local governments follow when making zoning decisions.[125] Thus, the 1983 Constitution took a step back toward the 1945 Constitution, but only granted the General Assembly authority to create "procedures" through which zoning and planning powers might be used. The ability of the General Assembly to require zoning decisions to conform to plans remains unclear and will depend on judicial gloss of "procedures" in the future.[126]

The 1985 General Assembly was the first to exercise the power over procedures granted by the 1983 Constitution. House Bill 51 (the Georgia Zoning Procedure Act) and House Bill 325 were en-

---

121. GA. CONST. OF 1945 art. IX, § III, ¶ I(11) (1972). State power was retained to impose "restrictions over land use in order to protect and preserve the natural resources, environment and vital areas." GA. CONST. OF 1983 art. III, § VI, ¶ II(a)(1). *See* Geron v. Calibre Companies, 250 Ga. 213, 296 S.E.2d 602 (1982); Pope v. City of Atlanta, 240 Ga. 177, 240 S.E.2d 241 (1977).

122. STATE OF GEORGIA SELECT COMMITTEE ON CONSTITUTIONAL REVISION, TRANSCRIPTS OF MEETINGS, COVERDELL SUBCOMMITTEE ON GOVERNMENTAL REORGANIZATION, at 80 (Subcommittee, June 23, 1980). The active intervention of the judiciary in the wake of *Barrett* was decried and attributed in part to the vacuum left when the home rule provisions removed the General Assembly from zoning.

123. STATE OF GEORGIA SELECT COMMITTEE ON CONSTITUTIONAL REVISION, TRANSCRIPT OF MEETINGS, LEGISLATIVE OVERVIEW COMMITTEE, at 104 (Subcommittee, June 30, 1981).

124. STATE OF GEORGIA SELECT COMMITTEE ON CONSTITUTIONAL REVISION, TRANSCRIPT OF MEETINGS, COMMITTEE TO REVISE ARTICLE IX, at 64 (Full Committee, Oct. 10, 1980).

125. GA. CONST. OF 1983 art. IX, § II, ¶ IV.

126. *See supra* notes 43-46 and accompanying text.

https://readingroom.law.gsu.edu/gsulr/vol2/iss2/37 HeinOnline -- 2 Ga. St. U. L. Rev. 122 1985-1986

acted. While lacking in many specifics, House Bill 51 mandated locally drafted written procedures for zoning hearings and standards for zoning decisions. It expanded the minimum standards for notice of zoning hearings to include posting of a sign on the property in addition to notice by publication at least fifteen days in advance of a hearing.[127] House Bill 325, a population bill, affected only DeKalb County, Fulton County, and the City of Atlanta (counties and municipalities over 400,000 population). The bill set up a system derived from impact analysis requiring a written record by a planning commission or department setting forth its investigation and recommendation on factors designed to give a broader perspective than the *Guhl* standards developed by the courts.[128]

CONCLUSION

The Georgia Supreme Court has cooled in its affair with substantive due process represented by *Barrett* and its progeny. It has fostered the emergence of procedural fairness and sometimes has appeared more favorably disposed toward needed regulation.[129]

---

127. O.C.G.A. §§ 36-66-1—36-66-5 (Supp. 1986); *See Selected 1985 Georgia Legislation, Local Governments: Counties/ Municipalities: Zoning Power*, 2 Ga. St. U.L. Rev. 314 (1985).

128. O.C.G.A. §§ 36-67-1—36-67-6 (Supp. 1986); *See supra* note 127. Although the courts have had an uncertain course on the relevance of public service problems to zoning decisions on traffic, the bill expressly makes physical capacities and public services relevant. *See also supra* note 73.

129. Georgia has traditionally followed the rule in interpretation of zoning ordinances that "ambiguities . . . should be resolved in favor of the free use of property." City of Cordele v. Hill, 250 Ga. 628, 628, 301 S.E.2d 161, 162 (1983) (a doublewide mobile home found to be outside the city's definition of "mobile home"). Justice Hill's dissent in that case urged an approach which more effectively implemented the intent of the local legislative enactment. *Id.* at 629, 301 S.E.2d at 162. In Board of Comm'rs v. Welch, 253 Ga. 682, 324 S.E.2d 178 (1985), the court parroted the traditional "free use" analysis while construing the county zoning ordinance in light of its preamble to include a zoning district which appeared to have been inadvertently repealed. *Id.* Three justices dissented from the result because it insufficiently upheld free use of property. *Id.* at 685, 324 S.E.2d at 180.

The support for zoning is still sporadic. In the first case interpreting a zoning ordinance after Justice Hill's retirement from the court, the Supreme Court, with dissent only by Justice Weltner, cited *Henry County v. Welch* in finding that "placing a mobile home on a lot does not . . . amount to erecting a mobile home on the lot" for purposes of the city zoning code section setting minimum set-backs, lot sizes, and frontages. Cain v. Town of Sparks, 256 Ga. 310, 311, 348 S.E.2d 645, 646 (1986).

In seven of nine substantive challenges to zoning decided in 1986 through November, the Georgia Supreme Court has ruled against local zoning. In five of those seven cases, the supreme court reversed trial court verdicts favoring local zoning.

HeinOnline -- 2 Ga. St. U. L. Rev. 123 1985-1986

The legislative movement to establish procedural rules for local planning and zoning under the 1983 Constitution dovetails with the judicial trend. The collaboration of the General Assembly and judiciary can bring Georgia zoning law to Norman Williams' fourth stage of American land use controls, "sophisticated judicial review . . . a wiser, more skeptical, and more realistic view of local government and of the various parties in interest."[130]

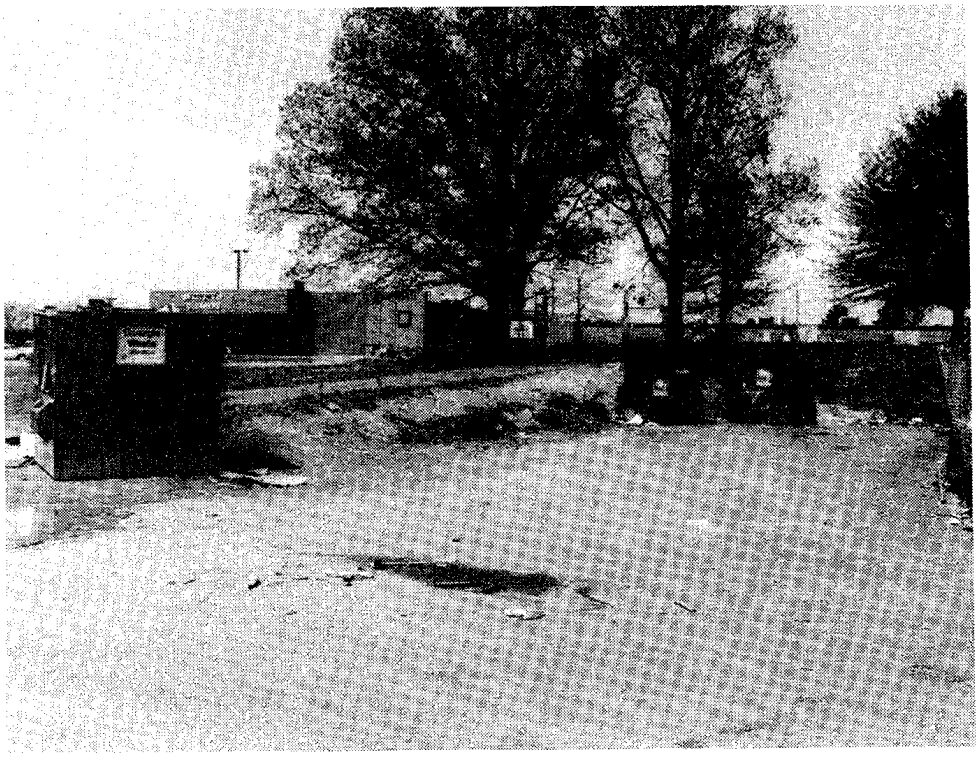
130. N. WILLIAMS, *supra* note 1, at § 5.05.

I. Barrett v. Hamby

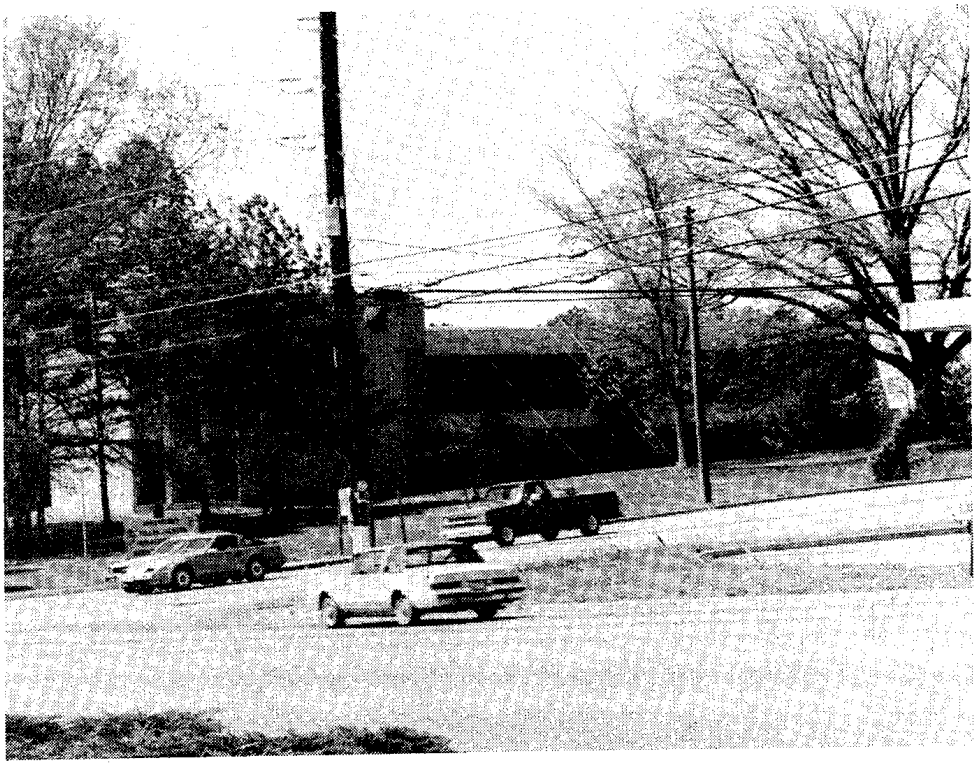
Hamby Family Gravesite

Commercial Development on the Former Hamby Property

HeinOnline -- 2 Ga. St. U. L. Rev. 125 1985-1986



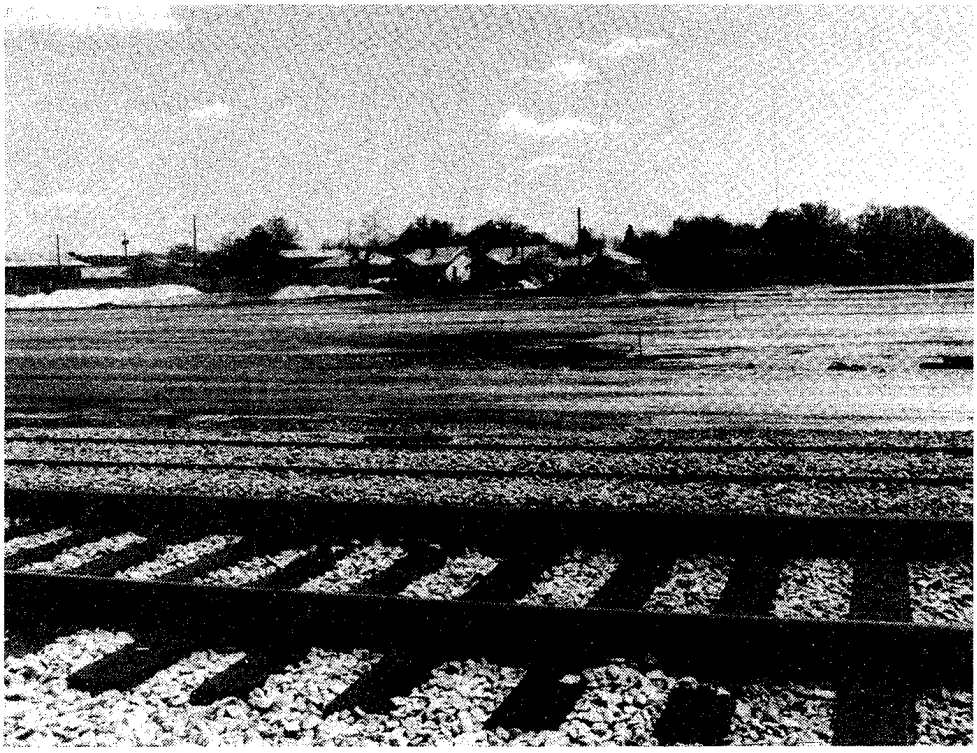
The "buffer" for the cemetery



Sprayberry High School seen from
Hamby Property

II. Seaboard System RR Inc. v. BanLester

Piggyback Yard Facing West Toward Downtown



Piggyback Yard Facing South Into Cabbagetown

III. Neighborhood Sellouts

Aruba Circle and Site of First Neighborhood Sellout

Site of DeKalb County v. Albritton Properties

Commercial Intrusion into
Lake Hearn Subdivision

HeinOnline -- 2 Ga. St. U. L. Rev. 129 1985-1986