Zoning and Land Use Law

by Newton M. Galloway*

and Steven L. Jones**

This year and volume, the seventieth of the *Mercer Law Review*, mark the second year that the Zoning and Land Use Law survey returned to the *Mercer Law Review* after the Great Recession. Development continued to thrive over the survey period.[1] The housing market in Georgia, especially in the metro Atlanta area, remains a seller's market with demand greatly exceeding supply.[2] The commercial and industrial market also remains energized as more companies relocate their headquarters or site new manufacturing facilities in the state.[3] As the development economy steams ahead, more and more land use and zoning cases are reaching Georgia's appellate courts—though, as shown in this Article, their pathway to appeal may be confusing. Zoning jurisprudence is again evolving, and practitioners must be vigilant to follow new authorities. This Article identifies important zoning and land use

*Partner, Galloway & Lyndall, LLP. Mercer University (B.A., 1978); Mercer University School of Law (J.D., 1981). Member, Mercer Law Review (1979–1981). Member, State Bar of Georgia.

**Associate, Galloway & Lyndall, LLP. University of Georgia (B.B.A., 2012); Mercer University School of Law (J.D., 2016). Member, Mercer Law Review (2014–2016). Member, State Bar of Georgia.

1. For an analysis of zoning and land use law during the prior survey period, see Newton M. Galloway & Steven L. Jones, *Zoning and Land Use Law*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 371 (2017).

2. *See*, *e.g.*, Michael E. Kanell, *Atlanta Home Sales Dropping, Price Rising*, MYAJC.COM (FEB. 21, 2018), https://www.myajc.com/business/atlanta-home-sales-dropping-price-rising/0iszpibUk1o3XU8Hu0uk7L/.

3. *See*, *e.g.*, Michael E. Kanell, *Korean Solar Company to Build 500 Worker Plant in Dalton*, MYAJC.COM (MAY 30, 2018), https://www.myajc.com/business/korean-solar-company-build-500-worker-plant-dalton/KDl0GMK7y8UiCZKnZLEhhL/ (last visited Sept. 9, 2018); Chelsea Beimfohr, *Macon Amazon Facility Should be Finished in June*, 13WMAZ (May 9, 2018), https://www.13wmaz.com/article/news/local/macon-amazon-facility-should-be-finished-in-june/93-550419053.

decisions of the Georgia Supreme Court and Georgia Court of Appeals issued between June 1, 2017 and May 31, 2018.[4]

I. APPEALS TO SUPERIOR COURT

A. Lathrop v. Deal—*Actions for Declaratory and Injunctive Relief Must be Brought Against Local Government Officials in Their Individual Capacities*

Although the facts of *Lathrop v. Deal*[5] did not involve zoning, *Lathrop* significantly impacted the procedure by which relief may be sought against public officials in zoning litigation. The writing anticipating *Lathrop*, however, was already on the wall. In 2014, in *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*,[6] the Georgia Supreme Court held that sovereign immunity extends to claims seeking injunctive relief.[7] Two years later, in *Olvera v. University System of Georgia Board of Regents*,[8] the supreme court extended sovereign immunity to suits seeking declaratory relief.[9] Neither decision involved a constitutional claim. *Lathrop* presented the court with its first opportunity to consider whether sovereign immunity extends to constitutionally based declaratory and injunctive relief claims.[10] The supreme court held that it does.[11]

Lathrop involved House Bill 954,[12] passed by the Georgia General Assembly in 2012.[13] House Bill 954 requires a physician to determine the probable gestational age of an unborn fetus before performing an

4. This Article does not review cases involving condemnation, nuisance, trespass, easements, or restrictive covenants. Since this Article does not cover every planning and zoning case issued during the survey period, additional recommended cases for review are *SDS Real Property Holdings, Ltd. v. City of Brookhaven*, 341 Ga. App. 862, 802 S.E.2d 100 (2017) (involving interpretation of a conflict provision in an overlay district and of note to ordinance drafters) and *Monumedia II, LLC v. Department of Transportation*, 343 Ga. App. 49, 806 S.E.2d 215 (2017) (holding that the Georgia Outdoor Advertising Control Act (OACA), O.C.G.A. §§ 32-6-70 to -97, does not apply to indoor signs, even if they can be seen from roadways and that the City of Atlanta's zoning ordinance was not intended to regulate indoor signs).

5. 301 Ga. 408, 801 S.E.2d 867 (2017).

6. 294 Ga. 593, 755 S.E.2d 184 (2014).

7. *Id.* at 603, 755 S.E.2d at 192.

8. 298 Ga. 425, 782 S.E.2d 436 (2016).

9. *Id.* at 428, 782 S.E.2d at 438–39.

10. *Lathrop*, 301 Ga. at 409, 801 S.E.2d at 869.

11. *Id.*

12. Ga. H.R. Bill 954, Reg. Sess., 2012 Ga. Laws 575 (codified at O.C.G.A. § 31-9B-2 (2018)).

13. *Id.*

abortion and prohibits the physician from performing the abortion if the fetus is determined to be twenty-weeks old or more, absent circumstances that fall within a statutory medical exception.[14] When a medical exception authorizes the abortion, the physician must act in a manner that

> provides the best opportunity for the unborn child to survive unless, in [the physician's] reasonable medical judgment, [doing so] . . . would pose a greater risk either of the death of . . . or . . . substantial and irreversible physical impairment of a major bodily function of the pregnant woman.[15]

Physicians must file a post-operation report with the Department of Public Health.[16] Under the Official Code of Georgia Annotated (O.C.G.A.) section 16-12-141,[17] records of licensed facilities and hospitals are subject to inspection by the local district attorney.[18]

Numerous licensed-Georgia physicians challenged House Bill 954, seeking declaratory judgment and injunctive relief against Governor Deal and other state officials in their official capacities. The plaintiffs alleged that House Bill 954 violated numerous provisions of the Constitution of the State of Georgia, and they sought injunctive relief to prevent its enforcement. While *Lathrop* was still pending in the trial court, the supreme court decided *Sustainable Coast*.[19] Based thereon, the trial court granted the defendants' motion to dismiss both the declaratory and injunctive relief claims, and the plaintiffs appealed.[20]

An almost unanimous supreme court, in a lengthy opinion penned by Justice Blackwell, recited the ebbs and flows of the doctrine of sovereign immunity.[21] The court examined the lofty barrier sovereign immunity imposes in common law to suits against the state, including suits against state officers and officials in their official capacities.[22] The common law doctrine of sovereign immunity became a provision of the Georgia

14. O.C.G.A. § 31-9B-2(a) (2018). The medical exceptions are those necessary to (1) "[a]vert the death of the pregnant woman;" (2) "avert [a] serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman;" or (3) "[p]reserve the life of an unborn child." O.C.G.A. § 16-12-141(c)(1)(A)–(B) (2018).

15. O.C.G.A. § 16-12-141(c)(1)(B)(2) (2018).

16. O.C.G.A. § 31-9B-3(a) (2018).

17. O.C.G.A. § 16-12-141 (2018).

18. O.C.G.A. § 16-12-141(d) (2018).

19. *Lathrop*, 301 Ga. at 410–11, 801 S.E.2d at 870–71.

20. *Id.* at 411, 801 S.E.2d at 871.

21. *Id.* at 413–14, 801 S.E.2d at 872–73.

22. *Id.*

Constitution in 1974.[23] Under both the common law and the Georgia Constitution, only the Georgia Constitution or the General Assembly can waive sovereign immunity.[24] The court explained that sovereign immunity (as understood at common law) was constitutionally reserved "beginning with the 1974 amendment of the Constitution of 1945."[25]

The supreme court noted that at common law, sovereign immunity generally did not bar suits against state officials in their individual capacities when it was alleged that they acted beyond their legal authority.[26] Then, the supreme court distinguished a suit against an official alleged to have exceeded the official's legal authority from a suit brought against an official acting within one's official capacity.[27] The supreme court viewed the latter as an attempt to "control the action of the State or subject it to liability, [because] the suit is in effect one against the State."[28] The supreme court held that these principles of sovereign immunity extend to claims based on constitutional grounds.[29]

Based on this precedent, the supreme court concluded in Division IV of *Lathrop*:

> The constitutional doctrine of sovereign immunity bars any suit against the State to which it has not given its consent, including suits against state departments, agencies, and officers in their official capacities, and including suits for injunctive and declaratory relief from the enforcement of allegedly unconstitutional laws. If the consent of the State is to be found, it must be found in the Constitution itself or the statutory law.[30]

Therefore, sovereign immunity bars actions against individual state officers acting within the authority of their official capacities. However, the court noted that suits could still be brought against officials in their individual capacities, as it held in *Sustainable Coast* and *Olvera*.[31]

23. *Id.* at 424, 801 S.E.2d at 879; *see* GA. CONST. of 1945, art. VI, § 2, para. 10 (as amended in 1974).

24. GA. CONST. art. I, § 2, para. 9; *Lathrop*, 301 Ga. at 419–20, 801 S.E.2d at 876 (quoting Sheley v. Bd. of Pub. Educ., 233 Ga. 487, 487, 212 S.E.2d 627, 627–28 (1975)).

25. *Lathrop*, 301 Ga. at 424, 801 S.E.2d at 879.

26. *Id.* at 414, 801 S.E.2d at 873 (quoting Cannon v. Montgomery, 184 Ga. 588, 591, 192 S.E. 206, 208 (1937)).

27. *Id.*

28. *Id.* at 415, 801 S.E.2d at 873 (quoting *Cannon*, 184 Ga. at 591, 192 S.E. at 208).

29. *Id.*

30. *Id.* at 444, 801 S.E.2d at 892.

31. *Id.*; *see also Sustainable Coast*, 294 Ga. at 603, 755 S.E.2d at 192; *Olvera*, 298 Ga. at 428, 782 S.E.2d at 438. The court also noted that there were other procedural avenues to challenge allegedly unconstitutional or unlawful official acts, such as section 23 of the

However, the supreme court limited *Lathrop*, holding that official immunity only bars suits against state officers for retrospective relief, such as "monetary damages and other relief for wrongs already done and injuries already sustained."[32] That does not bar "prospective relief—relief from the threat of wrongful acts and injuries yet to come—especially in the form of injunctions and declaratory judgments."[33] Official immunity protects state and local officers from liability for discretionary actions unless they exceed the scope of the officer's authority or are performed corruptly, willfully, or maliciously.[34] Official immunity does not protect governmental officers from liability in ministerial acts for mistakes and neglect.[35]

Ostensibly, this policy ensures quality individuals are willing to act in public service because they are not "too exposed to liability for monetary damages, [that] they might be too timid in exercising their lawful discretion for the public good, and their official decisions might become compromised, quite understandably, by their personal interest in avoiding liability."[36] Prospective application itself does not create a chilling effect on "good government" that retrospective, particularly monetary relief, is able to do.[37] The court found that when the General Assembly amended article I, section 2, paragraph 9 of the Georgia Constitution in 1991, it intended to shield officials from monetary damages.[38] Sovereign immunity is waived for takings claims, and it does not bar mandamus actions.[39]

Lathrop has significant implications for zoning actions. Applied to a zoning case, *Lathrop* holds that sovereign immunity bars actions against city and county officials acting within the authority of their official positions.[40] Following *Lathrop*, declaratory and injunctive relief resting on constitutional grounds (as most zoning claims do) must be brought against local government officials individually. Before *Lathrop*, zoning

Georgia Tort Claims Act, O.C.G.A. § 50-21-23(a), and sections 10 (declaratory judgment) and 19 (judicial review) of the Administrative Procedure Act, O.C.G.A. §§ 50-13-10(a), 50-13-19(a).

32. *Lathrop*, 301 Ga. at 434, 801 S.E.2d at 886.

33. *Id.*

34. *Id.* at 435–36, 801 S.E.2d at 886 (quoting Gormley v. State, 54 Ga. App. 843, 847–48, 189 S.E. 288, 289 (1936)).

35. *Id.* at 435, 801 S.E.2d at 886 (quoting Price v. Owen, 67 Ga. App. 58, 60–61, 19 S.E.2d 529, 531–32 (1942)).

36. *Id.* at 436, 801 S.E.2d at 887.

37. *Id.* at 436, 801 S.E.2d at 886.

38. *Id.* at 441–43, 801 S.E.2d at 890–91.

39. *Id.* at 434, 801 S.E.2d at 885.

40. *Id.* at 422, 801 S.E.2d at 877; *see also* GA. CONST. art. IX, § 2, para. 9.

actions in superior court that challenged the local government's zoning decision usually included an appeal under O.C.G.A. § 5-3-20;[41] a declaratory judgment claim, asking the court to declare the underlying zoning unconstitutional;[42] and a takings claim, alleging that denial of rezoning constituted a taking of the property's value in violation of the Just Compensation Clause[43] of the Georgia Constitution.[44] In light of *Lathrop*, the declaratory judgment action based on constitutional grounds cannot proceed against the local governing officials in their official capacities and can only be brought against them individually.[45] As the supreme court noted in a footnote in *Kammerer Real Estate Holdings, LLC v. Forsyth Board of Commissioners*,[46] its holding in *Lathrop* did not bar a declaratory action brought against county officials in their official capacities.[47]

However, *Lathrop*'s holding may make it more difficult to resolve zoning challenges. Local government officials (as do most defendants) often take a dim view of zoning challenges brought against them individually. Generally, local government officials recognize the risk of suit being brought against them acting in their official capacities as part of the territory of their official positions. After *Lathrop*, the distinction between claims brought against local government officials in their individual versus their official capacities will most likely be lost. Whether *Lathrop*'s requirement that declaratory judgment actions be pursued against local elected officials in their individual capacities creates an incentive or deterrent to resolution of zoning actions remains to be seen. However, the incentive to litigate strenuously to avoid any risk of individual liability is a strong one, and it may not be readily apparent to lay, local elected officials that (absent a claim of bad faith) a zoning appeal seeking declaratory relief only does not seek damages against them individually. If this misunderstanding persists in litigation, local officials will probably be less inclined to resolve litigated zoning actions. Consequently, more zoning appeals may be decided by superior courts and, as a result, reach the Georgia appellate courts, causing the body of zoning jurisprudence to enlarge. Alternatively, the Georgia appellate

41. O.C.G.A. § 5-3-20 (2018).

42. *See* Diversified Holdings, LLP v. City of Suwanee, 302 Ga. 597, 807 S.E.2d 876 (2017).

43. GA. CONST. art. I, § 3, para. 1.

44. *Id*.

45. *Lathrop*, 301 Ga. at 444, 801 S.E.2d at 892.

46. 302 Ga. 284, 806 S.E.2d 561 (2017).

47. *Id.* at 286 n.2, 806 S.E.2d at 563 n.2. The supreme court directed the trial court on remand to "take up the question of sovereign immunity," but it cautioned: "the trial court should resolve that question before entering any further judgment on the merits." *Id.*

courts may devise a way to narrow the filter of zoning cases that reach their dockets.

B. A Look Back at City of Cumming v. Flowers

The case of *City of Cumming v. Flowers*,[48] cited in the 2017 survey,[49] held that, regardless of the appeal method prescribed in the local government's zoning ordinance, a "quasi-judicial" decision by a local government official, board, or governing authority must be appealed by writ of certiorari.[50] A variance was at issue in *Flowers*, but dicta in *Flowers* suggested that the supreme court might apply its holding to the appeal of a legislative zoning decision, particularly a challenge to approval or denial of a special exception (also known as a conditional-use or special-use application), which Georgia Zoning Procedures Law (ZPL),[51] defines as a legislative zoning decision.[52] In the 2017 Survey, the questions were posed as to whether *Flowers*'s holding conflicted with ZPL, and whether an appeal of a local government's zoning decision must proceed by writ of certiorari. Neither question was resolved during the survey period.

However, *Kammerer* partially addressed the issue. Kammerer Real Estate Holdings, LLC owned property in Forsyth County on which it sought to construct an automobile service facility. Kammerer's application for a site development permit was denied by the County's Planning Director because the development would violate a zoning condition (of which Kammerer was aware) that required certain "open space" to remain undeveloped on the lot. Kammerer's request that the County's Board of Commissioners (BOC) remove the condition was denied. Then, Kammerer sought judicial review by means of writ of certiorari and filing a petition for declaratory judgment against the County, BOC, and Director (cumulatively, the defendants) contending that the open space requirement was unconstitutional. Kammerer also sought a writ of mandamus to issue the site development permit. The defendants moved to dismiss. The trial court granted the motion in part and denied in part.[53] The supreme court affirmed in part and reversed in part.[54]

48. 300 Ga. 820, 797 S.E.2d 846 (2017).

49. *See* Galloway & Jones, *supra* note 1, at 374.

50. *Flowers*, 300 Ga. at 820, 797 S.E.2d at 848.

51. O.C.G.A. §§ 36-66-1 to -6 (2018).

52. *Flowers*, 300 Ga. at 833–34, 797 S.E.2d at 857 (citing O.C.G.A. § 36-66-3(4) (2018)).

53. *Kammerer*, 302 Ga. at 284–85, 806 S.E.2d at 562.

54. *Id.* at 285, 806 S.E.2d at 562. In addition to reversing on the basis of *Flowers*, the court also reversed because the trial court dismissed for failure to state a claim under

On appeal, the supreme court, citing *City of Rome v. Pilgrim*,[55] held that "the mere fact that a zoning regulation is in effect at the time property is purchased does not preclude the purchaser from attacking its constitutionality."[56] The supreme court, instead of applying the right-for-any-reason rule,[57] reversed the trial court for citing the local ordinance as setting the procedure required for appeal.[58] The supreme court stated that "the scope of review by writ of certiorari is [set] by state law . . . and its scope cannot be enlarged by local ordinance."[59] On remand, the supreme court directed the trial court to reconsider the motion to dismiss in light of *Flowers*.[60]

The supreme court may have given the direction to the trial court on remand to solidify or expand its holding in *Flowers*. The imposition of a condition of rezoning is a legislative zoning act. So, the supreme court in *Kammerer* certainly expanded the applicability of *Flowers* beyond a variance. However, uncertainty regarding application of *Flowers* to a zoning decision, whether rezoning or special exception, remains.

C. City of Sandy Springs Board of Appeals v. Traton Homes—*A Writ of Certiorari Has Three Parties to the Appeal; Failure to Name and Serve All of Them Is Fatal*

A petition for a writ of certiorari seeking review by a superior court of a local government's zoning decision is governed by O.C.G.A. § 5-4-3,[61] which provides as follows:

> When either party in any case in any inferior judicatory or before any person exercising judicial powers is dissatisfied with the decision or

O.C.G.A. § 9-11-12(b)(6) (2018) because it considered Kammerer's brief in response to the motion to dismiss, instead of just the pleadings. *Kammerer*, 302 Ga. at 286, 806 S.E.2d at 563. The court also affirmed the denial of the motion to dismiss with respect to a claim for attorney's fees under O.C.G.A. § 13-6-11 (2018) because the parties had not briefed whether the same was available "in connection with declaratory and mandamus relief." *Kammerer,* 302 Ga. at 287, 806 S.E.2d at 564. The court did note that "[t]here is at least some authority for the proposition that they are available in declaratory judgment and mandamus cases." *Id.* at 287 n.5, 806 S.E.2d at 564 n.5. "Much is left to be resolved on remand." *Id.* at 288, 806 S.E.2d at 564.

55. 246 Ga. 281, 271 S.E.2d 189 (1980).

56. *Kammerer*, 302 Ga. at 285, 806 S.E.2d at 562 (citing *Pilgrim*, 246 Ga. at 284, 271 S.E.2d at 191).

57. *Id.* at 285 n.2, 806 S.E.2d at 562 n.2 (citing Hardin v. Hardin, 301 Ga. 532, 537, 801 S.E.2d 774, 778 (2017)).

58. *Id.* at 287, 806 S.E.2d at 564.

59. *Id.*

60. *Id.*

61. O.C.G.A. § 5-4-3 (2018).

> judgment in the case, the party may apply for and obtain a writ of certiorari by petition to the superior court for the county in which the case was tried, in which petition he shall plainly and distinctly set forth the errors complained of. *On the filing of the petition in the office of the clerk of the superior court, with the sanction of the appropriate judge endorsed thereon*, together with the bond or affidavit, as provided in [O.C.G.A. §] 5-4-5, *it shall be the duty of the clerk to issue a writ of certiorari, directed to the tribunal* or person *whose decision or judgment is the subject matter of complaint, requiring the tribunal or person to certify and send up all the proceedings in the case to the superior court, as directed in the writ of certiorari*.[62]

A petitioner-in-certiorari seeking appeal must be mindful of the procedural obligations of O.C.G.A. § 5-4-6.[63] Subsection (a) requires a petition for writ of certiorari be filed "within [thirty] days after the final determination of the case in which the error is alleged to have been committed."[64] O.C.G.A. § 5-4-6(b)[65] provides,

> The certiorari petition and writ shall be filed in the clerk's office within a reasonable time after sanction by the superior court judge; and a copy *shall be served on the respondent*, within five days after such filing, by the sheriff or his deputy or by the petitioner or his attorney. A copy of the petition and writ *shall also be served on the opposite party* or his counsel or other legal representative, in person or by mail; and service shall be shown by acknowledgement or by certificate of the counsel or person perfecting the service.[66]

The procedural pitfalls of the certiorari process were exemplified four days into the current survey period when the court of appeals decided *City of Sandy Springs Board of Appeals v. Traton Homes, LLC*.[67] In *Traton Homes*, the Sandy Springs Community Development Director interpreted the City's zoning ordinance in a manner with which Traton Homes, LLC (Traton Homes) disagreed. The City's Board of Appeals (BOA) affirmed the Director's interpretation, and Traton Homes sought judicial review, filing a petition for writ of certiorari naming the BOA and its individual members as respondents. The superior court sanctioned the petition and issued summonses to the respondents.[68]

62. O.C.G.A. § 5-4-3 (emphasis added).
63. O.C.G.A. § 5-4-6 (2018).
64. O.C.G.A. § 5-4-6(a) (2018).
65. O.C.G.A. § 5-4-6(b) (2018).
66. *Id.* (emphasis added).
67. 341 Ga. App. 551, 801 S.E.2d 599 (2017).
68. *Id.* at 551, 801 S.E.2d at 601.

The BOA then, *inter alia*, filed a motion to dismiss asserting (1) that a writ had not been issued; (2) consequently, the BOA had not been properly served; and (3) Traton Homes had not named the City as the defendant, and therefore, had not served the petition or writ on the City. In response, Traton Homes asserted that its failure to name the City was not fatal. It filed an amended petition naming the City, contending that the amendment was authorized by O.C.G.A. § 5-4-10,[69] which provides that "certiorari proceedings shall be amendable at any stage, as to matters of form or substance, as to the petition, bond, answer, and traverse."[70] The trial court denied the BOA's motion to dismiss, but it issued a certificate of immediate review that was granted by the court of appeals.[71]

The court of appeals reversed the trial court on all grounds raised in the BOA's motion to dismiss, holding that

> neither the order sanctioning the petition nor the summonses issued in this case satisfied the requirements of a writ of certiorari which, according to statute, must be "directed to the tribunal or person whose decision or judgment is the subject matter of complaint, requiring the [BOA] to certify and send up all the proceedings in the case to the superior court.[72]

Thus, O.C.G.A. §§ 5-4-3 and 5-4-6 were not followed.[73] Consequently, no writ was ever issued, and as a result, the writ was never served.[74] "And while it is . . . the clerk's duty to *issue* the writ, it is also separately the petitioner or his counsel's duty to ensure that a writ is served."[75] For that reason, the superior court erred in failing to grant BOA's motion to dismiss.[76]

The court of appeals also found that the plain language of O.C.G.A. § 5-4-6(b) requires that a copy of the petition and writ must be served upon the respondent-in-certiorari and both "*shall also be served on the opposite party*, [the defendant-in-certiorari,] or his counsel or other legal representative."[77] The court of appeals reminded the bar that the BOA,

69. O.C.G.A. § 5-4-10 (2018).

70. *Traton Homes, LLC*, 341 Ga. App. at 551–52, 801 S.E.2d at 601 (quoting O.C.G.A. § 5-4-10).

71. *Id.* at 552, 801 S.E.2d at 601.

72. *Id.* at 554–55, 801 S.E.2d at 603 (quoting O.C.G.A. § 5-4-3).

73. *Id.* at 555, 801 S.E.2d at 603.

74. *Id.* at 556, 801 S.E.2d at 604.

75. *Id.* at 555–56, 801 S.E.2d at 603–04.

76. *Id.* at 556, 801 S.E.2d at 604.

77. *Id.* at 557, 801 S.E.2d at 605 (quoting O.C.G.A. § 5-4-6(b)).

as the lower tribunal judicatory body whose decision was appealed, was the respondent-in-certiorari or the "body *in* the dispute."[78] However, the opposite party was the City, as defendant-in-certiorari or the "party *to* [the] dispute."[79] The defendant-in-certiorari and respondent-in-certiorari are "separate entities with possibly conflicting interests."[80] The court of appeals held that Traton Homes's failure to serve the City as defendant-in-certiorari was fatally defective.[81]

Despite the ability to amend the petition pursuant to O.C.G.A. § 5-4-10, failure to serve the City as defendant-in-certiorari was not curable by amendment.[82] Traton Homes's failure to name and serve the City as the opposite party rendered its original petition (and any subsequent amendment) void *ab initio*.[83] The court of appeals held that the superior court should have granted the BOA's motion to dismiss with prejudice.[84]

D. Stuttering Foundation, Inc. v. Glynn County—*A Usufruct Does Not Bestow Standing*

In *Stuttering Foundation, Inc. v. Glynn County*,[85] the supreme court held that a usufruct, as opposed to an estate for years, was insufficient to convey a substantial interest, and therefore, standing to challenge a zoning decision.[86] Whether a party has standing to challenge a zoning decision has long been determined by the two-step "substantial interest-aggrieved citizen" test.[87] First, a person must have a substantial interest in the challenged zoning decision.[88] Second, that interest must actually be suffering, or in danger of suffering, a special injury or damage not common to similarly situated property owners.[89]

In *Stuttering Foundation, Inc.*, the Stuttering Foundation (Foundation) leased office space in an office park building in unincorporated Glynn County owned by Lucas Properties Holdings III,

78. *Id.* (quoting Fisher v. City of Atlanta, 212 Ga. App. 635, 636, 442 S.E.2d 762, 763 (1994)).

79. *Id.* (quoting *Fisher*, 212 Ga. App. at 636, 442 S.E.2d at 763).

80. *Id.* (quoting *Fisher*, 212 Ga. App. at 636, 442 S.E.2d at 763).

81. *Id.* at 558, 801 S.E.2d at 606.

82. *Id.* (quoting Hudson v. Watkins, 225 Ga. App. 455, 456, 484 S.E.2d 24, 25–26 (1997)).

83. *Id.* at 558, 801 S.E.2d at 605.

84. *Id.* at 558, 801 S.E.2d at 606.

85. 301 Ga. 492, 801 S.E.2d 793 (2017).

86. *Id.* at 495–97, 801 S.E.2d at 798–99.

87. Massey v. Butts Cty., 281 Ga. 244, 246–48, 637 S.E.2d 385, 387–88 (2006).

88. DeKalb Cty. v. Wapensky, 253 Ga. 47, 48, 315 S.E.2d 873, 875 (1984).

89. *Id.*

LLC (the Landlord). The Landlord applied to rezone the property to construct an addition to the building of the Foundation. The Landlord's rezoning application and site plan were approved. But the Foundation appealed, seeking to reverse rezoning approval. The trial court granted motions to dismiss on the basis that the Foundation lacked standing to challenge the zoning decision.[90] The supreme court affirmed.[91]

The presumption under Georgia law that a five-year lease confers an estate for years upon the tenant[92] is trumped by evidence that the parties intended otherwise.[93] The Foundation's lease was for five years, but it explicitly stated that "no estate shall pass out of Landlord and this Lease shall create a usufruct only."[94] Though an estate for years carries an absolute right to use the property, a usufruct is merely a license that gives the tenant the right to possess and enjoy the real estate.[95] "No estate passes out of the landlord" when only a usufruct is conveyed.[96] The supreme court concluded that only entities holding a vested or inchoate (not yet vested) title have standing under the substantial interest-aggrieved citizen test.[97] Thus, the Foundation lacked standing because it only held a usufruct in the property.[98]

The Foundation's argument that its ability to challenge approval of the Landlord's rezoning was analogous to the right of a tenant of condemned property did not succeed.[99] The supreme court noted that eminent domain cases utilize a much broader definition of "property rights" than the substantial interest-aggrieved citizen test.[100] Likewise, the Foundation's argument that it was the beneficiary of recorded easements and restrictive covenants that burden the Landlord's property was also unsuccessful.[101] The supreme court determined that the Foundation had no title nor recordable interest in the Landlord's

90. *Stuttering Foundation, Inc.*, 301 Ga. at 492, 801 S.E.2d at 796.

91. *Id.* at 505, 801 S.E.2d at 804.

92. O.C.G.A. § 44-7-1(b) (2018).

93. *See Stuttering Foundation, Inc.*, 301 Ga. at 495, 801 S.E.2d at 797–98.

94. *Id.* at 495, 801 S.E.2d at 797 (quoting O.C.G.A. § 44-7-1(b) (2018)).

95. *Id.* at 496, 801 S.E.2d at 798.

96. *Id.* (quoting Jekyll Dev. Assocs., L.P. v. Glynn Cty. Bd. of Tax Assessors, 240 Ga. App. 273, 274, 523 S.E.2d 370, 371 (1999)).

97. *Id.*

98. *Id.* at 497, 801 S.E.2d at 799. The supreme court, nonetheless, reminded the Foundation (and other licensees) that its lease may provide a remedy for breach. *Id.*

99. *Id.* at 498, 801 S.E.2d at 799.

100. *Id.* at 498, 801 S.E.2d at 800.

101. *Id.* at 501, 801 S.E.2d at 802.

property subject to the easements or covenants, nor was it an intended or express third-party beneficiary of the same.[102]

II. APPEAL TO GEORGIA APPELLATE COURTS

A. Schumacher v. City of Roswell—*A Challenge to the Precedent of* Trend Development Corp. v. Douglas County

Two opinions issued within the survey period address the procedure by which a "zoning case" may be appealed to Georgia's appellate courts: *Schumacher v. City of Roswell*[103] and *Diversified Holdings, LLP v. City of Suwanee*.[104] In both cases, the supreme court addressed the issue of whether an appeal of a "zoning case" should proceed by means of direct appeal pursuant to O.C.G.A. § 5-6-34[105] or instead require an application pursuant to O.C.G.A. § 5-6-35.[106] Zoning practitioners will recall that the supreme court addressed the same issue in the 1980s. The issue was definitively resolved (or so it appeared) by *Trend Development Corp. v. Douglas County*,[107] which clearly required that "appeals in zoning cases will henceforth require an application."[108] The supreme court's decision in *Schumacher* called *Trend Development*'s direction into question.[109] The supreme court's subsequent effort to clarify *Schumacher* in *Diversified Holdings* was unsuccessful.[110]

To address *Schumacher* and *Diversified Holdings*, the holding in *Trend Development* must be viewed in its historical perspective. In *Trend Development*, the supreme court resolved an inherent conflict between the texts of O.C.G.A. §§ 5-6-34 and 5-6-35 that plagued litigants seeking to appeal in zoning decisions for at least ten years, which presented zoning practitioners with a procedural minefield.[111] In most zoning cases, an action is filed by an unsuccessful applicant after denial of a rezoning (or other) application by the local government. However, the action brought in superior court may include many more claims in addition to a simple allegation that the rezoning application should have been approved.

102. *Id.* at 502, 801 S.E.2d at 802.
103. 301 Ga. 635, 803 S.E.2d 66 (2017).
104. 302 Ga. 597, 807 S.E.2d 876 (2017).
105. O.C.G.A. § 5-6-34 (2018).
106. O.C.G.A. § 5-6-35 (2018).
107. 259 Ga. 425, 383 S.E.2d 123 (1989).
108. *Id.* at 425, 383 S.E.2d at 123.
109. *Schumacher*, 301 Ga. at 638, 803 S.E.2d at 69–70.
110. *Diversified Holdings, LLP*, 302 Ga. at 603, 807 S.E.2d at 883.
111. *Trend Dev. Corp.*, 259 Ga. at 426, 383 S.E.2d at 123.

O.C.G.A. § 5-6-34 allows direct appeals for cases in which certain equitable remedies are sought following denial of rezoning.[112] A superior court complaint challenging rezoning denial may include a demand for a writ of mandamus or injunctive relief. A rezoning applicant may claim entitlement to use the property as requested in the denied rezoning application as a matter of right, irrespective of rezoning denial. They may apply for a permit to construct or operate a use authorized in the zoning district requested in the rezoning application. When the local government denies the permit, the allegation supporting a writ of mandamus is postured. The superior court action may also include a request for injunctive relief to prevent the local government from enforcing the zoning ordinance's prohibition of the use sought in the rezoning application. If mandamus or injunctive relief is denied by the superior court, direct appeals may be taken on both claims.[113] O.C.G.A. § 5-6-34(a)(4)[114] allows a direct appeal from orders "granting or refusing applications . . . for interlocutory or final injunctions."[115] O.C.G.A. § 5-6-34(a)(7) allows a direct appeal from the "granting or refus[al] to grant mandamus."[116]

O.C.G.A. § 5-6-35 may also apply to actions arising from rezoning denial. O.C.G.A. § 5-6-35(a)(1)[117] requires an application for "[a]ppeals from decisions of the superior courts reviewing decisions of . . . state and local administrative agencies, and lower courts by certiorari or de novo proceedings."[118] This section served as the basis for the decision in *Trend Development*. However, the decision to zone property is a legislative decision, and the local government's council or commission is not acting as a "local administrative agency" when it denies a rezoning application.[119] However, local ordinances may require that an appeal from certain land use decisions be taken to a superior court by certiorari.[120] Also, the decision to grant a variance to the zoning regulations is an administrative, not legislative function. [121] If the local

112. O.C.G.A. § 5-6-34.

113. O.C.G.A. § 5-6-34(a)(7) (2018).

114. O.C.G.A. § 5-6-34(a)(4) (2018).

115. *Id.*

116. O.C.G.A. § 5-6-34(a)(7).

117. O.C.G.A. § 5-6-35(a)(1) (2018).

118. *Id.*

119. Schumacher v. City of Roswell, 337 Ga. App. 268, 271, 787 S.E.2d 254, 256 (2016), *rev'd*, 301 Ga. at 635, 803 S.E.2d at 66; *see Trend Dev. Corp.*, 259 Ga. at 425–26, 383 S.E.2d at 123-24.

120. Galloway & Jones, *supra* note 1, at 377; *see Flowers*, 300 Ga. at 822, 797 S.E.2d at 850.

121. *Schumacher*, 337 Ga. App. at 270, 787 S.E.2d at 255.

government is held to be a "local administrative agency," then an appeal from a decision of the superior court reviewing the local government decision could fall under the statute requiring an application to appeal.[122]

Confronted with the conflict, zoning practitioners commonly filed both a direct appeal pursuant to O.C.G.A. § 5-6-34 and an application for appeal pursuant to O.C.G.A. § 5-6-35. Then, the zoning practitioners and parties waited to see which appeal would proceed, if either. This increased the cost to the parties, the amount of paper required for an appeal, and the volume of appellate court filings. It also required more administrative work and the preparation of more orders by the respective courts.

The supreme court's decision in *Trend Development* ended the conflict.[123] In the first paragraph of the opinion in *Trend Development*, the court could not have made itself clearer: "The Court takes this opportunity to advise bench and bar that appeals in zoning cases will henceforth require an application."[124] The court went on to state, "As this case is an 'appeal from the decision of the superior court reviewing a decision of a local administrative agency,' it comes within the scope of O.C.G.A. § 5-6-35(a)(1), which requires application for review."[125]

Trend Development is best viewed as a pragmatic decision intended to eliminate the preparation and filing of competing appeals in the same case. From the *Trend Development* decision forward, zoning practitioners knew that a "zoning case" could only make it to review by Georgia's appellate courts through application.

It can certainly be argued that *Trend Development*'s requirement for appeal by application was legally wrong and ignored express statutory provisions governing appeals. O.C.G.A. §§ 5-6-34(a)(4) and (7) very clearly provide for a direct appeal from an order that denies or grants either an injunction or mandamus, irrespective of whether the subject matter of the case involves zoning.[126] Additionally, a zoning decision by a local government is a legislative act, not administrative.[127] As such, O.C.G.A. § 5-6-35(a)(1) should not even apply to the appeal of a zoning decision, but, *Trend Development* became the law. Additionally, *Trend Development*'s requirement that zoning cases must be appealed only by application was very clear. Zoning practitioners followed its direction.

122. *Id*.

123. *Trend Dev. Corp.*, 259 Ga. at 426, 383 S.E.2d at 123.

124. *Id.*

125. *Id.* (quoting Atlanta Bd. of Zoning Adjustment v. Midtown Inn, 257 Ga. 496, 497 n.1, 360 S.E.2d 569, 570 n.1 (1987)).

126. O.C.G.A. § 5-6-34(a)(4), (7).

127. *Schumacher*, 337 Ga. App. at 271, 787 S.E.2d at 256.

Trend Development's directive was virtually unquestioned for nearly thirty years—until *Schumacher*. In *Schumacher*, Schumacher and Nyden, two residents of the City of Roswell (the City), were dissatisfied when the City enacted a new zoning ordinance. They challenged the procedure the City used in adopting a new zoning ordinance and accompanying zoning map. The superior court granted the City's motion for judgment on the pleadings. Schumacher and Nyden filed a direct appeal to the court of appeals,[128] which applied *Trend Development*, and dismissed the appeal because an application for the appeal was required and not filed.[129] Of note, Judge Rickman questioned *Trend Development*'s holding, concerned that the City's legislative body was not an administrative agency.[130] The supreme court granted certiorari.[131]

The supreme court allowed Schumacher's direct appeal and reversed the court of appeals.[132] The supreme court held that the enactment of a new zoning ordinance was "an exercise of legislative power—and thus not an adjudicative 'decision' under the statute."[133] It held further, "Moreover, the City Council was not acting as an 'administrative agenc[y].' The enactment of ordinances is at the core of the City Council's legislative functions."[134] The supreme court distinguished and reconciled *Trend Development*, based on the distinction between a factual scenario that challenged the enactment of a new, comprehensive zoning ordinance (as in *Schumacher*) and "a 'decision' by an 'administrative agenc[y]' dealing with the zoning or allowed use of a particular parcel of land."[135] Therefore under *Schumacher*, the enactment of a new zoning ordinance is a legislative act from which a challenge may be directly appealed, but the denial of rezoning on a single parcel of land must proceed by application as an appeal of the superior court's review of a decision of an administrative agency.[136]

128. *Id.* at 268, 787 S.E.2d at 254.

129. *Id.* at 274, 787 S.E.2d at 256.

130. *Id.* at 274, 787 S.E.2d at 258 (Rickman, J., concurring).

131. *Schumacher*, 301 Ga. at 635, 803 S.E.2d at 66.

132. *Id.* at 635, 641, 803 S.E.2d at 66, 71. The supreme court did not mention the standing of Schumacher and Nyden to challenge the City's enactment of a new zoning ordinance. Usually, citizens must satisfy the substantial interest-aggrieved citizen test for the suit to even proceed. Unless Schumacher and Nyden suffered some form of special damages resulting directly from the enactment of the new zoning ordinance, they were similarly situated to all City residents, and they lacked standing to challenge the enactment. *See Massey*, 281 Ga. at 246–48, 637 S.E.2d at 387–88.

133. *Schumacher*, 301 Ga. at 637, 803 S.E.2d at 69.

134. *Id.* at 638, 803 S.E.2d at 69.

135. *Id.*

136. *See id.* at 635, 803 S.E.2d at 66.

In *Diversified Holdings*, the supreme court subsequently tried to further reconcile *Schumacher* and *Trend Development* in a case involving the rezoning of a particular parcel. There, Diversified Holdings, LLP (Diversified Holdings), the property owner, appealed the denial of rezoning of thirty acres in the City of Suwanee (the City). The property was zoned commercial, and rezoning was sought to develop multi-family housing. The City denied rezoning, and the superior court upheld rezoning denial. Diversified Holdings filed both a direct appeal and an application for discretionary appeal from the superior court's order.[137]

The supreme court held that an application for discretionary appeal was required.[138] Since *Diversified Holdings* involved an action seeking rezoning of a particular parcel of land, the direct appeal allowed in *Schumacher* was not available. The supreme court held:

> [W]e conclude that . . . the present appeal, which is from a superior court order affirming a local zoning board's decision that the zoning regulations applied to a particular piece of property are not unlawful, is the type of individualized determination that remains subject to the application procedure set out in [O.C.G.A.] § 5-6-35(a)(1).[139]

Ultimately, *Diversified Holdings* continued the distinction that permitted a direct appeal to challenge the adoption of a new zoning ordinance but required an application for discretionary appeal to challenge the denial of rezoning for a single parcel.[140]

Two significant problems are apparent on the face of *Diversified Holdings*. First, the City Council denied Diversified Holdings's rezoning application.[141] The City Council is the legislative body of the City, not an advisory local zoning board. The City Council is a legislative body, and its zoning decision is a legislative act.[142] Second, the supreme court's distinction (in *Schumacher* and *Diversified Holdings*) between different types of zoning decisions ignores the plainly stated and enumerated "zoning decisions" defined in ZPL. In fact, ZPL is not mentioned in either *Schumacher* or *Diversified Holdings*. ZPL, in O.C.G.A. § 36-66-3(4), defines a zoning decision, to include the following:

> (4) "Zoning decision" means final legislative action by a local government which results in:

137. *Diversified Holdings, LLP*, 302 Ga. at 599, 807 S.E.2d at 881.
138. *Id.* at 614, 807 S.E.2d at 890.
139. *Id.* at 605, 807 S.E.2d at 884.
140. *Id.*
141. *Id.* at 597, 807 S.E.2d at 879.
142. *Id.* at 603, 807 S.E.2d at 883.

> (A) The adoption of a zoning ordinance;
>
> (B) The adoption of an amendment to a zoning ordinance which changes the text of the zoning ordinance;
>
> (C) The adoption of an amendment to a zoning ordinance which rezones property from one zoning classification to another.[143]

Under O.C.G.A. § 36-66-3(4)(C), the rezoning of a single parcel is a legislative zoning decision, just like the adoption of a new zoning ordinance.[144] Each is a legislative decision in its own right, and neither constitutes a decision of an administrative agency. The supreme court's effort to distinguish between the two types of zoning decisions ignores this plain statutory language. After *Schumacher* and *Diversified Holdings*, zoning practitioners will be well advised to return to the practice of filing both direct appeals and applications for appeal in all zoning actions, as was done before *Trend Development*.

III. DIVERSIFIED HOLDINGS, LLP V. CITY OF SUWANEE—DAMAGES RESULTING FROM INVERSE CONDEMNATION

In *Diversified Holdings*, the supreme court also addressed whether denial of rezoning or the application of a zoning regulation could support a claim for damages resulting from inverse condemnation.[145] Inverse condemnation occurs when the government passes an ordinance or regulation that deprives the owner of all or part of the value of real estate.[146] Title is not conveyed to the government.[147] In *Diversified Holdings*, the supreme court distinguished between the exercise of eminent domain and the police power, stating that a claim for taking by means of inverse condemnation does not fall within the "per se" category of takings claims where there is a "permanent physical infringement of property."[148] The supreme court stated that "zoning is unlikely to be a fertile ground for inverse condemnation claims" and further that "[z]oning, in short, does not ordinarily present the kind of affirmative public use at the expense of the property owner that effects a taking."[149] As a result, "[I]nverse condemnation will apply when the owner [is]

143. O.C.G.A. § 36-66-3(4)(A)–(C) (2018).
144. O.C.G.A. § 36-66-3(4)(C).
145. *Diversified Holdings, LLP*, 302 Ga. at 597, 807 S.E.2d at 879.
146. *Id.* at 606–07, 807 S.E.2d at 885.
147. *Id.*
148. *Id.* at 607, 807 S.E.2d at 885.
149. *Id.* at 610, 807 S.E.2d at 887–88.

completely deprived of the use of the property."[150] Arguably, *Diversified Holdings* limits the zoning litigant's remedy to an arbitrary and capricious due process claim.[151]

It is problematic that the supreme court's analysis is at least partially based on its determination that it could identify no zoning case in which the "party claiming inverse condemnation received a 'takings' remedy, that is, financial damages to compensate for the loss of their property."[152] This results from legal practicality, not the lack of a viable taking claim. Damages are always a question for the jury, including in zoning cases. In most zoning cases, the property owner prefers the ability to develop property as rezoned, rather than pay to litigate for two years to reach a jury trial on damages. In most successful actions challenging rezoning denial, the superior court considers the legal issues presented and then remands the rezoning application back to the local government to take a zoning action in accordance with its decision. Hopefully, the zoning issues are resolved on remand. So, most zoning cases are resolved before a jury trial on the issue of damages arising from the taking of property is required. However, not all rezoning cases are either remanded or resolved.

The rezoning applicant's claim, however, that the property value is taken by virtue of the application of a zoning classification that denies the property owner reasonable economic use of the property is no less viable. The existing zoning classification applied to a specific parcel will not result in a taking of the value thereof unless it deprives the property of reasonable economic use.[153] To diminish the significance of the diminution of the property's value by application of the zoning ordinance does the property owner a significant disservice, and it fails to take into account the time lost in fighting the rezoning battle. Whether the supreme court's holding in *Diversified Holdings* constitutes a substantive change in zoning law will depend on future appeals.

150. *Id.* at 608, 807 S.E.2d at 886.

151. *Id.* at 611, 807 S.E.2d at 888.

152. *Id.*

153. Gwinnett Cty. v. Davis, 271 Ga. 158, 159, 517 S.E.2d 324, 325 (1999); Bickerstaff Clay Prods. Co. v. Harris Cty., 89 F.3d 1481, 1488 (11th Cir. 1996).